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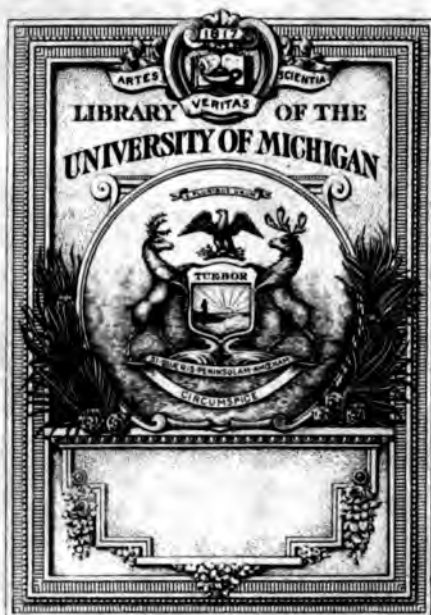
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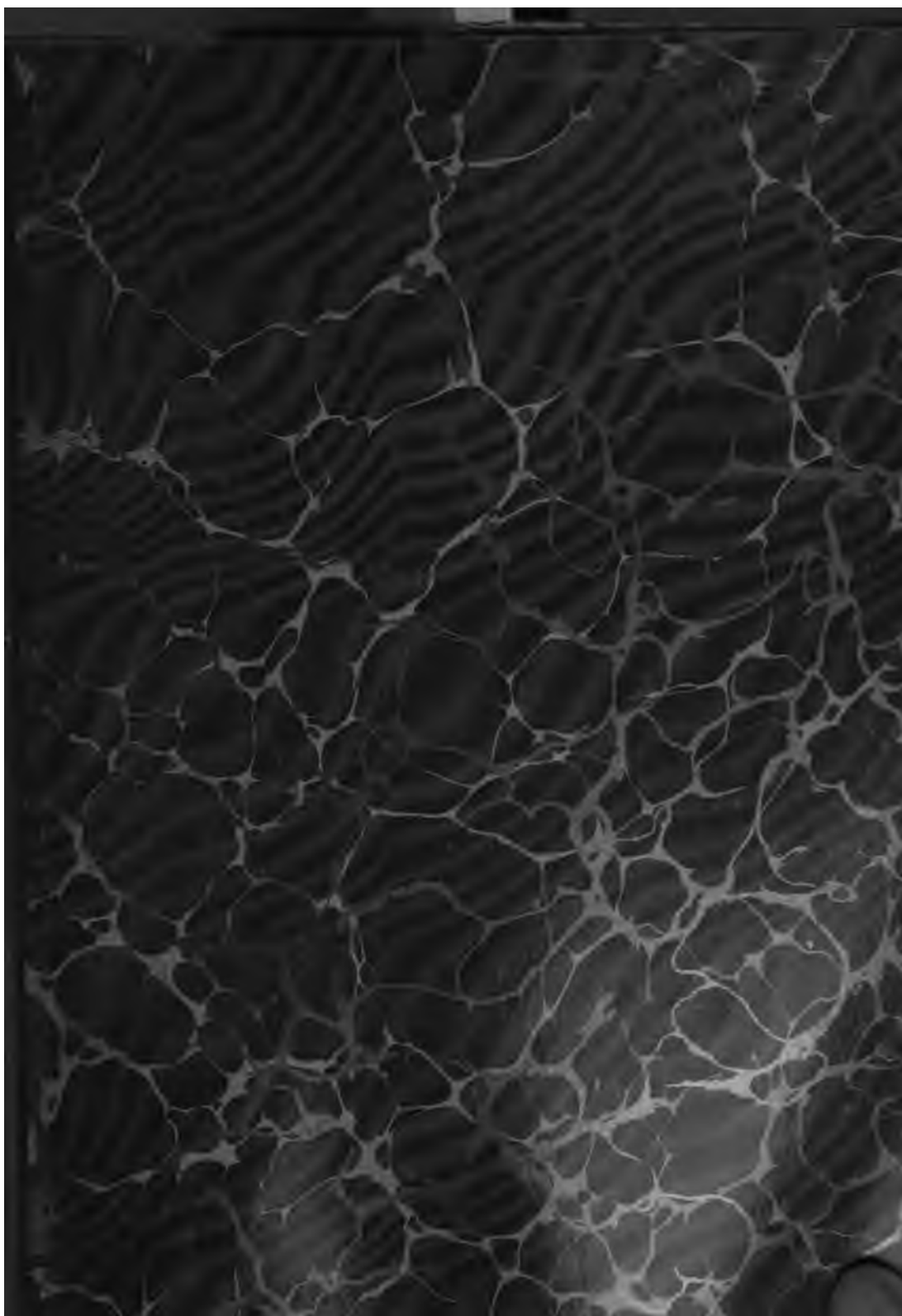
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Isidor Rayner

THESES

FOR RAYNER

BY
RAYNER

BY
RAYNER

BY COMPANY

NEW YORK



Andrew Carnegie

ADDRESSES
OF
HON. ISIDOR RAYNER

COMPILED BY
WILLIAM B. RAYNER

Edited by
J. FRED'K ESSARY
Washington Correspondent, The Baltimore Sun



JOHN MURPHY COMPANY

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1914

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WILLIAM B. RAYNER



Press of **JOHN MURPHY COMPANY**, Baltimore, Md.

To my Mother

FRANCES JANE RAYNER

*Whose pride and faith in my father was
his greatest inspiration, this volume is
affectionately dedicated.*

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FOREWORD.

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This volume, containing the leading addresses of the late United States Senator Isidor Rayner, has been published at the instance of Mr. William B. Rayner, the only son, and for twenty years the intimate associate and devoted companion of the lamented statesman. No thought of commercial profit or material gain prompted Mr. Rayner to provide the means that made this work possible. His sole purpose was the perpetuation of these speeches in some enduring form, for the use of those interested in the genius of the most eloquent and profound orator Maryland has given to the country since Henry Winter Davis. And no more fitting monument to that genius could be reared than the preservation of these matchless orations. Not all of Senator Rayner's public utterances are embodied in this book. Twenty years ago his earlier addresses were published, including those delivered in the Federal House of Representatives. In this later collection will be found the most striking products of this gifted Marylander, from the time he entered the United States Senate. It has been a matter of frequent criticism that the representative works of Maryland's distinguished sons have not been conserved in the form that their importance warranted. Mr. Rayner has, therefore, in directing the collection and publication of his father's orations and addresses, performed a service to the people of Maryland and the country at large that has a substantial value.

J. F. E.

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ISIDOR RAYNER.

No attempt will be made here to present a biographical outline of the career of the late Senator Rayner. This sketch will deal with the principles which he championed and the policies which he advocated, rather than with dates and places. The detailed steps of such a career may be important, but they are not, primarily, the factors that arrest the interest and hold the attention of those who study success or those who honor greatness. The fact that in his public service, however, Isidor Rayner stood for something; that he battled for something; that he accomplished something; that he had fixed purposes and adhered to them with a determination that won the applause of a nation, might be appropriately surveyed in a volume containing the best products of his fertile mind.

The circumstances of Senator Rayner's rise to a position of eminence in the greatest deliberative body in the world, are well known to every Marylander. His brilliant record as a student at the University of Virginia; his towering place as an advocate at the Baltimore Bar; his wonderful power as an orator on the hustings; his distinguished service as a member of the Federal House of Representatives; his success as Attorney General of his State, and his memorable defense of Admiral Winfield Scott Schley, are matters of Maryland history. It is unnecessary to review them. They are still fresh in the memory of the people whom he honored and who, in equal measure, honored him.

But the crowning achievements of this lawyer, this publicist, this statesman, were reserved for his service in the Senate of the United States. All that went before was simply preparatory, collegiate, formative. Here at last, was a theatre where his splendid abilities, his profound learning, his forensic skill, his

incisive wit and his withering satire had the fullest play. Here it was that the country awarded him a station of primacy and his associates the palm of leadership. Here it was that he met and measured strength with the master minds of his time. Here it was that he dedicated his superb talents to the cause of constitutional government and, planting himself upon the charter of the fathers, he challenged every interest that dared profane that sacred instrument. Into this arena he went, his judgment matured by broad experience, his convictions fixed by a far-reaching study of our institutions and the influences that were assailing and undermining them.

When Isidor Rayner took his seat in the Senate, that branch of Congress had ceased to be a representative body. It was in the hands of a mere handful of men who knew exactly what they wanted and how it could be obtained. Autocracy was rampant. The leadership of Aldrich, of Allison, of Foraker, of Hale and of Frye, had just reached its zenith. That notorious oligarchy, swollen with power and utterly indifferent to the voice of the people, legislated openly and brazenly in behalf of special interests. Lately removed from that stubborn and chastening opposition led by Vance, by Harris, by Morgan, by Blackburn and by Gorman, this combination ruled the Senate, and through it, ruled Congress with a power never before exercised by a single group of men in the history of the Republic. Sweeping changes soon impended, however. Great reforms were gathering force and the fall of this regime ultimately came just as it was ordained. But it did not decline until an aroused public sentiment hastened to the support of such men as Rayner, and Carmack, and Dolliver, and LaFollette and Beveridge, men who could fight and did fight with fists of iron.

And coincident with the rise of Senate absolutism, there developed yet another danger, threatening the order established more than a century ago by the Constitution. This was the

usurpation of prerogative by the Executive, the centralization of authority in a personal magistrate. It was the attempt to "convert an abstract sovereignty into a concrete sovereign." This school of centralizers, of twentieth century Federalists, of New Nationalists was headed and tailed by Theodore Roosevelt. As President, he had sought to govern with a power unqualified, unlimited, plenary, and in this ambition he was supported by all those idealists who regarded the Presidency as an office over which the courts had no restraint and Congress no control. The effort to wipe out the lines between State and national authority, and to destroy the relationship between the legislative and executive branches of the government presented a grave situation.

Isidor Rayner arrayed himself against these evils as soon as he entered the Senate. He denounced them with a vehemence that stirred the whole country. He found the old Constitution which he had sworn to uphold, in disrepute. He found it encroached upon or scoffed at on every side. He found Congress, on the one hand, enacting legislation for which there was no authority under the organic law, and found the President, on the other, appropriating powers never granted to the executive branch of the Government. He found the doctrine of States' rights sadly ignored. He found the sanctity of the courts invaded. He found the administrative departments making and executing treaties with foreign governments without either the advice or consent of the Senate. He found the ancient Monroe Doctrine revived and extended as a cloak to cover a multitude of sins.

Observing all these things Senator Rayner immediately found a field for labor and he threw himself into the contest with enthusiasm. He had studied constitutional law as it had been taught by Thomas Jefferson, by James Madison and John Randolph Tucker. He had taken his interpretations of that law from Marshall, from Taney and from Story and, fortified

by these authorities, he combatted with all his might the dangerous tendencies to which Congress was yielding and even the people were becoming reconciled. He thundered day after day against the liberties that were being taken with the fundamental instrument. He denounced every invasion of the reserved rights of the States. He maintained with all the force at his command that the Federal Government was endowed only with delegated and not with inherent powers. He fought against every move that was made by the Senate to legislate under the meaningless "General Welfare Clause" of the Constitution, that blanket excuse for anything and everything on earth.

Again and again Senator Rayner was taunted because of his old-fashioned devotion to the Constitution. And to this impeachment he never failed to respond with a plea of guilty. He was devoted to the Constitution and he gloried in the fact. Derision could not move him. He never retreated in the face of either scorn or ridicule. He believed the future of the Republic could only be safeguarded by the strictest adherence to that charter. He believed that the checks and balances which it imposed were essential to the perpetuity of representative government. He believed that any wilful disregard of the basic law would be fraught with the most serious consequences. He deplored the fact that the people were showing a willingness to turn from the written work to a collection of apocryphal constructions, as a refuge and a relief from the restraints that were fixed when the government was founded.

Senator Rayner, however, did not confine his activities or his debate to domestic matters. These were of the deepest concern to him, it is true, but his interest went further. It extended to every issue between this and a foreign country. He made a special examination of international affairs and the general law of nations. He studied the relations between the United States and other governments, and though a member of

the minority party during his entire service in the Senate, he had a powerful influence upon the foreign policies of three administrations. His review of the limitations upon the treaty-making power under the Constitution, for instance, was one of the most profound arguments the Senate ever listened to upon this subject. His definition of the scope and meaning of the Monroe Doctrine was another monument to his ability as a practical interpreter of international law and a student of its historical bearing. His appeal to the Senate for the termination of the Russian Treaty was answered by an overwhelming vote in favor of abrogation. His denunciation of the administration's policy toward Santo Domingo resulted in an instant reversal of that policy and a special message of apology from President Roosevelt.

But throughout his whole career, from first to last, this Marylander was an apostle of peace. He preached it in season and out. He called upon the United States to take the lead among the nations of the earth for the arbitration of international disputes. He supported every step in this direction, whether it originated in Congress or out of it. To him, war, as a means of settling controversies between governments, was nothing more or less than a return to barbarism. He could see no sense or sanity in the human sacrifices it entailed or the misery and desolation that followed in its wake. To him, war was simply organized and legalized murder, though "clad in martial pomp." It was brutal savagery, though exalted in history and glorified in tradition. And he verily believed that the time was approaching when war would be banished from the earth and "cease to be a mockery of religion's holiest offices, and a defiance of the Providence of God."

Another article of Senator Rayner's faith was respect for the duly constituted courts and a deference to their judgments. No man in public life in his day was more zealous in his defence of the judiciary. No man stood oftener between it

and that distrust, encouraged by those who sought by insidious means to subordinate the processes of justice to political expediency. No man fought harder to protect these tribunals from every influence tending to prostitute their machinery by making it responsive to public clamor. He believed that the courts were a bulwark, which once broken down, would mean the end of constitutional government. He did not believe them to be infallible, but he did believe that their functions should be inviolate and that any interference with them from the Executive or from Congress was a crime against the people whose rights and property were in their keeping.

Twice during Senator Rayner's service in the Senate, Congress faced the tariff issue. Twice during that period the citadel of protection was stormed and twice the assault was repulsed. The day was approaching when this structure was to crumble and fall, but it had not then arrived. In all the debates upon this the greatest of all economic questions, however, Senator Rayner stood firmly against a protective tariff, the effect or purpose of which was the prohibition of competition of foreign goods. He did not believe that Congress had any authority to levy an impost tax that was prohibitive. A duty to be constitutional, under the taxing power of Congress, according to his judgment, must be assessed for revenue only and could not be assessed for the primary purpose of aiding home industry. This was, of course, pure Democratic doctrine, a doctrine that has since been supported by an overwhelming vote of the people.

Senator Rayner took a stand upon every great national issue that arose during the period of his public service. And when he assumed a position he defended it with a vigor and a resourcefulness that even early in his career marked him as a man of uncommon promise. Henry Watterson was present at the first speech this Marylander ever made in Congress, and in

his report of this circumstance, he ventured a prophesy worthy of one inspired. In this review of the Rayner speech he said:

"If I were asked to select the member of the 50th Congress of the most marked intellectual force, I would, without hesitation, immediately name the Honorable Isidor Rayner, of Maryland. He is as profound and as brilliant as Judah P. Benjamin, and, as an orator, has no superior in the Senate or the House of Representatives. His speech yesterday on the Bill against Trusts captivated the House and took the galleries by storm. It compares favorably with anything that has been delivered in Congress since the days of the giants of the Augustine Age. It was argument and learning, and eloquence combined with satire, and when it was delivered the most noisy body in the world became hushed. The members of the House, including Mr. Reed, leader of the Republicans, crowded about him. The spectators in the galleries leaned over in their seats, not to lose a word, and when he closed it was a perfectly useless task of the Speaker to control the applause that came from both sides of the House and the galleries."

From that day until his death this Marylander ranked foremost among the public speakers of the last two decades. And it is not too much to say that in the sweep of his oratory, he combined the eloquence of a Sunset Cox with the logic of a Henry Wirt; the fire of a Henry Winter Davis with the force of a Reverdy Johnson; the brilliance of a Bourke Cochran with the beauty of a Robert L. Taylor. Such was the expanse of his genius. Often his speeches were luxuriant in their phrasing. Oftener though, this quality, this intensity, was sacrificed to cold, hard reasoning. Senator Rayner wanted to be more than merely eloquent. He wanted to be effective.

He first leaped into national fame by his masterly defence of Rear Admiral Schley, when the hero of Santiago was fighting desperately before the naval Court of Inquiry to clear his record. He electrified the whole country by his demand that

justice be done that gallant commander. And the popular response was as much a tribute to his eloquence as it was a vindication of his cause. By a singular circumstance Mr Rayner's last addresses upon the floor of the Senate was an appeal for an increased pension for the widow of the brave officer in behalf of whose honor he had plead twelve years before.

But Isidor Rayner has passed. This faithful tribune, this valiant defender of the Constitution, this fearless fighter of executive aggression, this strong right arm of his party has gone forever. He did not live to see the fruition of the party's hopes. He died just as a triumphant Democracy came into power in every branch of the government, just as the principles and policies for which he had contended were being given a vote of approval and confidence by the country. Had he lived he would have become one of the ablest spokesmen of the new order. He would have done his part in carrying into effect the pledges which had swept his party into power.

"The sun has made a glorious setting."

These were the last words of Isidor Rayner. And a glorious setting it was. He had fulfilled his mission. He had fought a good fight. He had kept the faith.

J. FRED'K ESSARY,

Washington, D. C.

CLOSING ARGUMENT BEFORE THE SCHLEY COURT OF INQUIRY.

It was this eloquent appeal for justice to the hero of the Battle of Santiago that first introduced Isidor Rayner to the country as one of the ablest advocates at the American bar. This argument occupied two days, and it has been practicable to include only the peroration in this volume.

Now, may it please the court, I have finished. I want to say that I have now briefly presented this case as it appears to me in its general outline. Such a trial as this has never, to my knowledge, taken place in the history of the world. It seemed to my mind that this case had hardly opened with the testimony of Captain Higginson before it commenced to totter, and from day to day its visionary fabric has dissolved from view. When Captain Cook, their last witness, was put upon the stand, the entire structure collapsed, and now, after the witnesses from our own ships, and the gallant captain and crew of the *Oregon*, and Admiral Schley, have narrated their unvarnished tale, the whole tenement, with all its compartments, from its foundation to its turret, has disintegrated and lies like a mass of blackened ruins.

It has taken three years to reveal the truth. There is not a single word that has fallen from the tongue of a single witness, friend or foe, that casts a shadow of reflection upon the honored name of the hero of Santiago. He has never claimed the glory of that day. Let it be known, he has never claimed the glory of that day. No word to this effect has ever gone forth from him to the American people. The valiant Cook, the heroic Clark, the lamented Philip, the intrepid and undaunted Wainwright, and all the other captains, and every man at every gun, and every soul on board of every ship are equal participants with Admiral Schley in the honor wrought upon that immortal day. We can not strike his figure down standing upon

the bridge of the *Brooklyn*. Says Boatswain Hill: "Every head was bowed but his, as the Spanish shot and shell fell thick and fast," and sent the life blood streaming from young Ellis, this gallant martyr for his country's cause.

We can not strike him down. "You may assassinate me, but you can not intimidate me," said the Irish patriot Curran, as he turned upon his accusers and traducers. There he stands upon the bridge of the *Brooklyn*, his ship almost alone, receiving the entire fire of the Spanish foe, until the *Oregon*, as if upon wings of lightning, sped into the thickness of this mortal carnage. "God bless the *Oregon*," was the cheer that rang from deck to deck; and on they went, twin brothers in the chase, until the lee gun was fired from the *Cristobal Colon*, and the despotic colors of Spain were swept from the face of her ancient possessions. "Well done; congratulate you on the victory," was the streamer that was sent from the halyard of the *Brooklyn*, and from that day to this no man has ever heard from Admiral Schley the slightest whisper or intimation that he has usurped the glory of that imperishable hour. The thunders of the *Brooklyn*, as she trembled on the waves, have been discordant music to the ears of envious foes, but they have pierced with a ringing melody the ears of his countrymen, and struck a responsive chord at the fireside of every American home. And what is more than all which has been revealed in this case, as matchless as his courage, and as unsullied as his honor, is his beautiful character, and the generous spirit that animates his soul, and the forgiving heart that beats within his bosom.

Yes; we can not strike him down. Erect he stands as the McGregor when his step was on his native heather, and his eye was on the peak of Ben Lomond. His country does not want to strike him down, nor cast a blur upon the pure escutcheon of his honored name.

For three long years he has suffered, and now, thank God, he believes that the hour of his vindication has come. With composure, with resignation, with supreme and unfaltering fortitude, he awaits the judgment of this illustrious tribunal; and if that deliverance comes, he can, from the high and exalted position that he occupies, look down upon his traducers and maligners, and with exultant pride exclaim: "I care not for the venomous gossip of clubs and drawing-rooms, and cliques and cabals, nor for the poisoned shafts of envy and of malice. I await, under the guidance of Divine Providence, the verdict of posterity."

THE MONROE AND ROOSEVELT DOCTRINES.

Speaking on January 8, 1906, to a resolution pending in the Senate against interference by this Government in the affairs of the Latin American republics, Senator Rayner took the position that the American flag does not follow a contract.

I presume it will not be inappropriate for me at this time to advance a few suggestions upon the subject-matter of the resolution that has just been read. It will be understood that in presenting certain conclusions I have reached upon this subject that I am only speaking for myself, and that I have no purpose and, certainly no power, to bind my party or any of my colleagues upon this floor to the acceptance of any views that I may now express.

We are today surging ahead with such velocity in the settlement of new questions in regard to our foreign policy toward contiguous States that it seems to me it is well to have an interchange of opinion upon the open field of controversy in reference thereto, so that after consulting the compass and taking our bearings we may possibly formulate some stead-

fast line of conduct in connection therewith, or at least rescue some fundamental truths and principles from the confusion into which they have fallen.

The problems that we are now encountering in the administration of our foreign policy in this direction, require mature thought and deliberation, and I plead with you at the outset not to, because some trifling incident occurs of no significance, that does not affect our welfare or in the slightest degree menace our safety, lay down a code of principles and precedents that may be revised by our successors and repudiated and repealed by future generations.

It is not my intention in anything I may say, to cast the slightest reflection upon the administration of the Department of State. While the questions at issue require a knowledge of constitutional and international jurisprudence, we all agree that the late lamented occupant of this portfolio, upon the field of diplomacy, was at least the peer of the brilliant line who preceded him and who have left the impress of their genius stamped upon the institutions of the Republic. In so far as the President is concerned, feeling that he has been actuated by the best and highest impulses in the whole course of his administration and believing in his sincerity and integrity of purpose, no carping criticism shall come from me even in cases where he may have challenged precedent and strained authority to secure what, in his judgment, appeared to be a benefit and advantage to his country.

I would like it to be known that I subscribe to every sentiment of the Monroe doctrine; that is, the genuine doctrine, the old text and not the revised edition; the original document and not the counterfeit presentment. I stand by every utterance that it contains, but I reject the whole brood of heresies framed by modern paraphrasers and annotators, called the Monroe doctrine, not a line of which ever sprang from the brain of the patriot whose name it bears.

The men, who, over three-quarters of a century ago, rang a proclamation through the world that at that time convulsed the political fabric of continental Europe, would never, if living at this hour, admit the construction that is now placed upon it; and its founders and its sponsors would never recognize it in its deformed and distorted shape. When a great invention in statesmanship dawns upon the world it seems proper that it should be associated with the name of its discoverer, and it ought not to be issued under a formula that no longer designates its ingredients and that has long since accomplished the purpose for which it was designed. When the department of State issues a manifesto that is the product of its own genius, it ought to be circulated under the name of its author. In vindication of the memory of the dead, and in defense of their rights, I protest against the use of their names to any instrument that does not bear their signatures, and to any doctrine that was never promulgated by their authority.

As a usual thing, if a principle is right, it would concern me in a small degree, whether it was fortified by tradition or had received the sanction of historic names. In this case the situation, however, is different, because we find that the President justifies his position upon the ground that he is merely enforcing a national policy, and that if we decline to act under existing emergencies it would be equivalent to abandoning a doctrine that is interwoven with our history and has become an integral part of our institutions. The charge is made that this new doctrine, which has been recently brought to our attention, is simply the old doctrine carried to its logical and inevitable conclusion in order to meet present conditions. This being the charge, it is absolutely essential in any discussion of this subject to find out whether this is the old doctrine or whether it is an entirely new one having no connection with the old. In order to ascertain this fact, I would like for a moment to call to the witness stand the spirits of Jefferson, of Adams, and

of Monroe, and ask them whether they are innocent or guilty of the charge that the President has preferred against them. I call Adams because he was the real author of the declaration of 1823. The internal evidence of the message demonstrates this to be a fact, because in its first expression it deals with the question of our northwestern boundaries, a controversy that had been conducted by Adams, and in connection with which he had employed almost the identical language contained in the message of President Monroe. Not only this, but Mr. Adams, narrating in his journal of December 6, 1845, a conversation with Mr. Bancroft, then in Mr. Polk's Cabinet, thus writes:

I said I approved entirely of Mr. Polk's repeated assertion of the principle first announced by President James Monroe, in a message to Congress, that the continents of North and South America were no longer to be considered as scenes for future European colonization. He said he had heard that this part of the message of Mr. Monroe had been inserted by him at my suggestion. I told him that was true; that I had been authorized by him to assert the principle in a letter of instruction to Mr. Rush, then Minister to England, and had written the paragraph in the very words inserted by Mr. Monroe in his message.

I would like to ask them this question: Was it ever contemplated that we should, under any circumstances, assume a protectorate—political or financial—over any of the Caribbean Islands or over any of the Latin-American Republics of Central or South America? Was not the motive that prompted the message one of self-interest, to insure us against attack, and to enable us to hold the key to the situation in the event any foreign power should attempt an invasion of American territory? I would like to ask Monroe: What did the message mean when it proclaimed—

It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness.

We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the

existing colonies or dependencies of any European power we have not interfered, and shall not interfere. But with the governments which have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States.

Was it our purpose to proceed one step further than to announce that we would not permit foreign powers to subvert the governments of Central and South America and supplant them with monarchical institutions? Was not this the whole scope and the object of the proceeding? Was it ever intended that we should either interfere with the governments of the Republics themselves or prohibit foreign governments from asserting civil rights against them, accorded and universally recognized by the law of nations?

Now let us call Jefferson. Let me say a word about Jefferson. During the last campaign a leading advocate of the Republican party, with a vein of satire, in a brilliant address before the Republican convention, remarked that the Democratic party was spending the whole of its time in trying to find out what Thomas Jefferson would do if he were living. It could not, in its leisure moments, devote its time to a better purpose. I would rather have the spirit of this dead pilot wafting over the ship of State than any living pilot that I know of, at the helm. He may have been a doctrinaire, but it is just this kind of doctrinaires who have shattered the idols of superstition, broken the fetters of bondsmen and liberated the world of thought. When in his retirement at Monticello he wrote to President Monroe:

The question presented by the letters you have sent me is the most momentous which has ever been offered to my contemplation since that of independence. That made us a nation; this sets our compass and points the course which we are to steer through the ocean of time opening on us.

What was he talking about? No man living had at that time a deeper insight than he had into the profound significance of the causes that moved Monroe to sound an alarm which notified every tyrant on this earth that the Western Hemisphere was ablaze with the conflagration of liberty. He knew it meant one thing alone, nothing less and nothing more, and that was, that a people once free upon this continent should never be enslaved again, and that no monarchy should ever be reared on this soil upon the ruins of republican institutions. He was thoroughly familiar with the *jure divino* autocracies of Europe and with their plans and expectations. He had been trained under the shadow of the Bastille. He was the mortal enemy of holy alliances and divine rights. He knew but one divine right, and that was the divine right of the people. In 1823, this old philosopher, from his knowledge of European conditions, understood the situation better than any man upon the American Continent. His faculties were growing stronger as his body became weaker. He was writing at this time upon every imaginable topic—philosophy, science, politics, literature, and religion—and thus surrounded when President Monroe solicited his opinion upon the suggestion of Mr. Canning, he sent the reply that has just been read.

This is an old story, I know, in this Senate Chamber, but let me ask you what was this momentous question that Jefferson referred to? Was it a money question? Was it a financial question? Was he contemplating the probable bombardment of a Caribbean port to enforce the payment of a usurer's bond? Was his mind perplexed by a vision of a war conducted by bailiffs and constables and collectors in the interest of foreign pawnbrokers, whose weapons are pledges and debentures, and who, struggling with each other for preference and priorities in their insatiate chase for plunder, sweep down upon the pitiful revenues of these bankrupt and impoverished republics until they become prostrate supplicants at the exchequers of the

world and are willing to yield their resources and concessions at any price or sacrifice that may be dictated in the gambling dens of the European stock market?

I am now trying to prove by the record, by the undisputed facts of history, by contemporaneous construction, the strongest evidence recognized by the canons of the law that the men who planted the seeds of the Monroe doctrine never contemplated that a despoiler's hand should enter the garden, take an alien weed, graft it on the parent stem and then claim that the harvest of this unholy wedlock is a natural growth that by organic process sprang from the virgin soil of the Republic. Let me once divest it of its nomenclature and I have gained the first point in this discussion. Then the new doctrine—call it what you will—must stand upon its own merits, not hallowed by prescription, and not infringing upon an ancient landmark.

Now, what is the principle of construction? I presume that the Monroe doctrine, though not within the international code, is subject to the same elementary rules of interpretation that govern any other instrument. What is the cardinal rule? You take the language, and then if there is a doubt, you take the environment and surroundings, the *res gestæ* of the transaction, the occasion that called for it, the emergency that produced it, *cessante ratione lex cessat*, the instructions to our ministers abroad, and principally the object that was to be accomplished, and from them you gather the intention. What is the President's interpretation? Upon pages 2 and 3 of a message that he has lately sent to the Senate marked "Customs Revenues of the Dominican Republic," and also marked "Confidential," but from which the injunction of secrecy has been removed, the President makes the following statement:

Under the accepted law of nations, foreign governments are within their right, if they choose to exercise it, when they actively intervene in support of the contractual claims of their subjects. * * *

An aggrieved nation can, without interfering with the Monroe doctrine, take what action it sees fit in the adjustment of its dispute with

American States, provided that action does not take the shape of interference with their form of government or of the despoliment of their territory under any disguise. But, short of this, when the question is one of a money claim, the only way which remains, finally, to collect it is a blockade, or bombardment, or the seizure of the custom-houses, and this means, as has been said above, what is in effect a possession, even though only a temporary possession of territory. The United States then becomes a party in interest, because under the Monroe doctrine it can not see any European power seize and permanently occupy the territory of one of these republics; and yet such a seizure of territory, disguised or undisguised, may eventually offer the only way in which the power in question can collect any debts, unless there is interference on the part of the United States.

With the most profound respect and admiration for the President, both for the office and for the individual, I deferentially reject this startling interpretation. I want the curtain to rise for a moment now, for I will presently analyze this statement in detail, but right now, though it is a thrice-told tale, and volumes have been written upon it, I want to call the actors upon the stage, with the scenery mounted and the play in full rehearsal, and see whether it leaves the same impression upon the minds of this distinguished audience as it does upon the President.

We all know that following the downfall of Napoleon, the rulers of Prussia, Russia, and Austria formed a conspiracy against human rights known as the "Holy Alliance." Instead of it being a "Holy Alliance," it was the unholyest plot ever conceived against the rights of humanity. It was succeeded in 1818 by the Congress of Aix la Chapelle. In 1820 it assembled at Laybach, in Styria, and again it met in Verona in 1822. At the last conference the following blasphemous declaration was made a part of the treaty.

The high contracting parties, well convinced that the system of representative government is as incompatible with the monarchical principle as the maxim of the sovereignty of the people is opposed to the principle of Divine right, engage in the most solemn manner to employ all their means and unite all their efforts to put an end to the system of representative government wherever it is known to exist in the

states of Europe and to prevent it from being introduced into those states where it is not known.

Now Canning appears upon the scene, and, what is a strange incident in this proceeding, and one that is hardly ever adverted to, Canning, after the rejection of his proposal to the United States for a European Congress to consider the affairs of Spanish America, announced that Great Britain would not permit any European intervention in Spanish America, and the French minister, Prince de Polignac, at that time disclaimed the slightest intention of interfering. He acquiesced in the judgment of Mr. Canning, that the subversion of South America by Spain was no longer a subject of practical consideration. President Monroe's message appeared a few months after this event, dated December 2, 1823. Take all these facts together, the cause that was operating, the danger that threatened, the influence at work, the utterances of the message and the participants in the event, and I would like some Senator now upon this floor to select a single utterance from any of the agencies in this affair that justifies the President's construction. Where is there a word that we should either at the point of war, deny to foreign powers the right to assert their just demands against these republics or become substantially responsible for the liquidation of their claims?

What part of the Monroe doctrine is it that withdraws these States entirely from the domain of international procedure and commands us to compel them to keep their faith with the nations of the world? We asserted then, as we do now, that we would not permit any new establishment of monarchical institutions upon the Western Hemisphere. Self-interest and self-protection were the main motives that we had at that time. If we add to this the sentiment that we were then, as we are now, in sympathy with Republican forms of government wherever they exist, and then add to this the further fact that the territory being adjacent to us and a menace to us in the

hands of a foreign power, that we did not propose to acquiesce in its encroachment by any European monarch, and that we would oppose any further colonization by foreign governments upon the shores of this continent, you have the whole of the Monroe doctrine from its inception to its completion, from its first to its latest utterance at the time it was promulgated.

Now permit me to bring this doctrine quickly down to the present time, because it is absolutely necessary that this should be done in order to intelligently discuss the practical propositions involved.

Upon January 20, 1824, Henry Clay moved the following resolution, which was never acted upon in the Committee of the Whole in the House of Representatives:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the people of these States would not see, without serious disquietude, any forcible intervention by the allied powers of Europe in behalf of Spain to reduce to their former subjection those parts of the Continent of America which have proclaimed and established for themselves, respectively, independent governments, and which have been solemnly recognized by the United States.

During the debate upon the Panama Congress in 1826, James Buchanan introduced and passed in the House of Representatives the following resolution:

In the opinion of the House, the United States ought not to form any alliance with all or any of the South American republics, nor ought they become parties with them to any joint declaration for the purpose of preventing the interference of any of the European powers with their independence or form of government, or to any compact for the purpose of preventing colonization upon the Continent of America, but that the people of the United States should be left free to act in any crisis in such manner as their feelings of friendship toward these republics or as their own honor and policy may at the time dictate.

On April 29, 1848, during the war with Mexico, President Polk transmitted to Congress the Yucatan message, and there-

upon a bill was introduced in the Senate to enable the President to take temporary military occupation of Yucatan. Then followed the discussion in which Mr. Calhoun made one of the most effective arguments in his public career, concluding with the memorable words that he had simply discharged his duty to his country and to the Cabinet of which he was the only surviving member.

Then we come to the Clayton-Bulwer treaty, to which I will not now refer, because the less said about it the better, *de mortuis nil nisi bonum*, and with the exception of the French intervention in Mexico, to which I shall presently make particular reference in another connection, it brings us to a brief consideration of the Venezuelan message of President Cleveland, sent to Congress on December 17, 1895. In the House of Representatives, and in an humble way on many other occasions, I was a firm adherent of the administration of President Cleveland. Men sometimes are forgotten when they live. Posterity will remember him, and he will occupy a high and isolated place in the annals of the Republic. I regret to say that it was impossible for me to accept the views of the Administration in the Venezuelan boundary controversy. If the Monroe doctrine had not been appealed to and our intervention had been placed upon an entirely distinct ground; and on behalf of Venezuela, and at her solicitation we had demanded as an international right that in order to avoid war between Great Britain and Venezuela that controversy should have been submitted to arbitration, it would have presented an entirely different aspect. I can not for a moment reconcile to any American precedent or to any principle of international law the proposition that in an honest dispute over a boundary line between a South American and a foreign State, we had a right to dictate the method of adjustment and by the menace of war compel submission to our terms or that the Monroe doctrine ever contemplated such an interference upon our part.

When Mr. Bayard submitted to Lord Salisbury the dispatch of Mr. Olney, it was sent by Lord Salisbury to the ablest lawyers in the Kingdom and to the law officers of the Crown for their opinion. It was submitted on the 7th of August, 1895, and this investigation accounts for the fact that there was no communication sent from Lord Salisbury to the British Minister of the United States until November 26, 1895. A statement that is peculiarly relevant to the present situation appears in this correspondence which I shall now cite, and I have emphasized the Venezuelan incident for this purpose. I cite it because Lord Salisbury and the eminent jurists who had evidently prepared his answer seem to agree with Secretary Olney upon a proposition that comes right home to us with pointed force and irresistible conclusion upon this occasion. It comes to us in a discussion in which Secretary Olney had proceeded beyond the utmost limit of any of his predecessors in the assertion of our rights under the message of President Monroe. Listen to the statement of Secretary Olney, the most liberal constructionist upon the Monroe doctrine who has ever presided over the Department of State, and tell me whether it does not sustain every proposition for which I am contending:

The Monroe doctrine does not establish any general protectorate by the United States over other American States. It does not relieve any American state from its obligations, as fixed by international law, or prevent any European power directly interested from enforcing such obligations or from inflicting merited punishment for the breach of them. It does not contemplate any interference in the internal affairs of any American state. It does not justify any attempt on our part to change the established form of government, altering that form according to our own will and pleasure. The rule in question has but a single purpose and object. It is that no European power or combination of European powers shall forcibly deprive an American state of the right and power of self-government and of shaping for itself its own political fortunes and destinies.

In the answer from the British foreign office there was this striking passage, not a line or an assertion of which was ever

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contradicted or denied in any subsequent correspondence upon the subject:

Whatever may be the authority of the doctrine laid down by President Monroe, there is nothing in his language to show that he ever thought of claiming this novel prerogative for the United States. It is admitted that he did not seek to assert a protectorate over Mexico or the States of Central and South America. Such a claim would have imposed upon the United States the duty of answering for the conduct of these states, and consequently the responsibility of controlling them. His sagacious foresight would have led him energetically to deprecate the addition of so serious a burden to those which the rulers of the United States have to bear. It follows of necessity that if the Government of the United States will not control the conduct of these communities, neither can it undertake to protect them from the consequent attaching of any misconduct to which they may be guilty toward other nations. If they violate in any way the rights of another state or its subjects, it is not alleged that the Monroe doctrine will assure them the assistance of the United States in escaping from any reparation which they may be bound by international law to give. Mr. Olney expressly disclaims such an interference from the principles he lays down.

I hope that I have now shown that the present doctrine is not the Monroe doctrine and that, therefore, it ought to have a new and proper name. We might call it the Dillingham doctrine, or, if the Senator from Alabama does not object, the Reader doctrine, or, what is better still, let us copyright it with a name that will surround it with proper dignity, and command the respect of the nations of the world, and call it the Roosevelt doctrine.

It becomes necessary for us now to analyze this new doctrine of the President, to see whether we will adopt and make it a part of our international code. The President has encountered a complicated situation, and if his conception of it is correct he has applied the remedy with a master's hand. If he has made an accurate diagnosis, his treatment will undoubtedly eradicate the malady. I know a distinguished physician whose remedies are simply marvelous. There is only one trouble about the doctor, and that is he generally treats his patients for the wrong disease. He is eminently successful because his

patients, not being afflicted with the disease that his diagnosis points to, they invariably recover from it. What is the President's diagnosis of this case? It is based upon two propositions:

First. His first proposition is that the only way, except by actual war, that one nation can forcibly collect a money claim against another, is by blockade, bombardment, or the seizure of its custom-houses, and under the accepted law of nations foreign governments are within their rights, if they choose to exercise it, when they actively intervene in support of the contractual claims of their subjects.

Second. His second proposition is that the United States then becomes a party in interest, so far as American States are concerned, because under the Monroe doctrine it could not see any European power seize and occupy the territory of any of these republics.

Upon the first proposition I respectfully deny that foreign nations are within their rights when they actively intervene in favor of the contractual claims of their subjects. With great deference to the President, this proposition is at war with the elementary principles of international law. There are some exceptions that sustain his statement in countries where anarchy and a failure to administer justice prevail, but with an exception in cases that are *sui generis* the rule is an inflexible and unbending one, precisely to the contrary tenor of what the President states it to be. In this country nearly every Secretary of State, including Madison, Adams, Clay, Webster, Calhoun, Marcy, Seward, and Blaine, have given the broad denial to suggestions of this character, so that until this new doctrine was promulgated it was considered a postulate and a fundamental maxim of international law that governments would not interfere in behalf of the contractual claims of their citizens, except through the channels of diplomacy and the proper presentation of the claims by their ministers. Of course, if the

President is in error upon this point, which is the major premise of his argument, his conclusions fall to the ground, and, therefore, owing to its great importance I now present to you a line of precedents taken from the text-writers that establish the true doctrine in this regard, and in doing so I desire to say that I am only referring to the principle ones, and that a volume could be filled with them if it became necessary to give the whole of them.

With regard to the contracts of an individual born in one country with the government of another, most especially when the individual contracting is domiciliated in the country with whose government he contracts and formed the contract voluntarily, for his own private emolument and without the privity of the nation under whose protection he has been born, he has no claim whatsoever to call upon the government of his nativity to espouse his claims, this Government having no right to compel that with which he voluntarily contracted to the performance of that contract. (Mr. John Quincy Adams, Secretary of State, to Mr. Salmon, April 29, 1823.)

The Government of the United States is not bound to interfere to secure the fulfillment of contracts made between their citizens and foreign governments, it being presumed that before entering into such contracts the disposition and ability of the foreign power to perform its obligations are examined, and the risk of failure taken into consideration. In cases of personal hardship and loss, however, like the present, the Department does not decline forwarding a statement of the grievance, with a recommendation of the claim, to the friendly offices of the Minister of the United States. (Mr. Marey, Secretary of State, to Mr. Fowler, July 17, 1856.)

The people who go to these regions (South America) and encounter great risks in the hope of great rewards must be regarded as taking all the circumstances into consideration, and can not with reason ask their Government to complain that they stand on a common footing with native subjects in respect to the alleged wants of an able, prompt and conscientious judiciary. We can not undertake to supervise the arrangements of the whole world for litigation, because American citizens voluntarily expose themselves, to be concerned in their deficiencies. (Mr. Seward, Secretary of State, to Mr. Burton, April 28, 1866.)

Citizens of the United States who take up their abode in a foreign country and enter into contracts with the citizens or public authorities there are presumed to make their engagements in accordance with, and subject to the laws of the country where the obligations imposed by the contract are to be fulfilled, and are ordinarily remitted to the remedies

afforded by those laws for the redress of grievances resulting from breaches or nonfulfillment of such contracts.

Instances may sometimes occur in which there has been a denial or miscarriage of justice in the courts. In such cases the good offices of the Department may properly be invoked on behalf of the claimant. The claims now in question are not deemed to be of a character which calls for such interposition. (Mr. Fish, Secretary of State, to Mr. Wing, December 9, 1873.)

The claimants in this case stand in the relation of parties to a contract into which they voluntarily entered with the Government of Brazil against which they now seek indemnity for losses sustained, resulting, as it is said, from acts of that Government alleged to be in contravention of their contract. It is a well-established rule of this Government that in such cases the parties are remitted for the redress of injuries resulting from any breach or disregard of the contract to the laws of the country in which the agreement was entered into and where it is to be performed. This rule, so far as known, is one generally recognized by other civilized powers. (Mr. Fish, Secretary of State, to Mr. Pratt, July 17, 1875.)

This Government does not interfere diplomatically to enforce claims of actual citizens of the United States arising out of contracts voluntarily entered into by them. When a contract is made by them under such circumstances the person is expected to have considered the ability and the readiness of the other party to carry out the contract. In this case particularly such instructions could not be issued. (Mr. Fish, Secretary of State, to Mr. Swann, May 4, 1876.)

A breach of contract virtually entered into between a citizen of the United States and a foreign government with which this Government holds diplomatic relations, is not regarded as ground for official interference on behalf of the citizen. (Mr. Evarts, Secretary of State, to Mr. Thomas, September 12, 1878.)

In regard to claims of that character (contracts), it is a rule of universal acceptance and practice that the person thus voluntarily entering into a contract with the government of a foreign country or with the subjects or citizens of such foreign power, for any grievances he may have or losses he may suffer resulting from such contract, is remitted to the laws of the country with whose government or citizens the contract is entered into for redress. (Mr. Blaine, Secretary of State, to Mr Logan, March 22, 1881.)

We must draw a careful and well-defined distinction between contracts and torts, not technical, but in international procedure, differing from each other just as clearly as they do under the strictest rules of common-law plead-

ing. We have and will exercise the right of intervention whenever a foreign government tortiously deprives an American citizen of his property, his liberty, or his life and declines to afford him proper redress therefor. This distinction has been so well taken by one of the most eminent men who has occupied the position of Secretary of State that it is well to quote his language in support of this proposition :

It has not been customary for this Department officially to interfere in behalf of citizens of the United States who may have entered into contracts with foreign governments, which the latter may not have fulfilled. The Department has usually limited its interposition to authorizing the proper diplomatic agent of the Government abroad to use his personal good offices toward obtaining relief for the claimant. The reason for this policy is that claims based on contract are supposed to stand upon a very different footing from those which arise from injuries to person and property committed by the authorities of any foreign government. (Mr. Fish, Secretary of State, to Mr. Bassett, June 27, 1870.)

By adopting a foreigner, under any form of naturalization, as a citizen, this Government does not undertake the patronage of a claim which he may have upon the country of his original allegiance or upon any other government.

To admit that he can charge it with this burden would allow him to call upon a dozen Governments in succession, to each of which he might transfer his allegiance to urge his claim. Under such a rule the government supposed to be indebted could never know when the discussion of a claim would cease. All governments are, therefore, interested in resisting such pretensions. I infer from the memorials of Mr. Vigil and of the legislature of New Mexico, that the claims to which you refer arose from contracts, expressed or implied, with the Mexican Government. Our long-settled policy and practice has been to decline the formal intervention of the Government, except in cases of wrong and injury to person and property, such as common law denominates torts and regards as inflicted by force, and not the results of voluntary engagements or contracts.

In cases founded upon contract the practice of this Government is to confine itself to allowing its Minister to exert his friendly good offices in commending the claim to the equitable consideration of the debtor without committing his own Government to any ulterior proceedings.

It seems to me that the President is equally in error, if we are at all to be controlled by usage or precedent, in stating that

the seizure of a custom-house and a blockade is equivalent to the seizure of territory within the meaning of the Monroe doctrine, and that it is our duty to interfere in Central and South America if foreign governments attempt to enforce their rights by this method. In the first place, as I have attempted to show, strictly contractual claims will not be asserted by any such process, and foreign governments recognize this rule just as well as we do, the exceptions being where there is a discrimination of justice or where there is a condition of lawlessness and a failure to comply with the usages of civilized society. If the citizens of foreign governments are subjected to a tortious invasion of their rights with the connivance of any of the Republics of Central or South America, and after every effort made to obtain indemnity without avail, foreign governments proceed to place the revenues of the offending government under their control so as to obtain redress, I deny that there is any seizure of territory within the meaning of the Monroe doctrine to invoke our interference, and I will give you now three striking illustrations in which this very process was resorted to and in which we never asserted any right to intervene or ever made the claim that under the Monroe doctrine it was within our duty or province so to do.

The first incident is that of Mexico. The English claim originated in tort. Under the orders of Miramon a body of rioters had broken into the residence of the British legation, plundered its vaults, and had taken a large amount of money, the property of English citizens. The claim of France was also one for indemnity for wrongs committed by Mexico.

In this connection I direct your attention to an important communication sent by Secretary Seward on August 23, 1862, to Mr. Dayton, the American minister in Paris, which reads as follows:

This Government, relying on the explanations which have been made by France, regards the conflict as a war involving claims by France

which Mexico has failed to adjust to the satisfaction of her adversary, and it avoids intervention between the belligerents.

Of course, we know that these explanations were false, and that the Emperor Napoleon was then engaged in the treacherous attempt to place an Austrian archduke upon the Mexican throne. What I want to emphasize, however, is that the correspondence of Mr. Seward proves that there was no reference whatever to the Monroe doctrine, and no attempt to interfere with the proceedings that the European governments had undertaken to enforce their rights until within a brief period before the time that Maximilian landed at Vera Cruz. Not only this, but afterwards, and after the close of our civil war, Mr. Bigelow, our minister to France, who succeeded Mr. Dayton, absolutely agreed to recognize Maximilian upon the withdrawal of French troops from Mexican territory.

This incident establishes what I am contending for, and that is that the Monroe doctrine does not come into operation until there is an actual attempt upon the part of foreign governments to subvert republican institutions upon this hemisphere.

The next incident is one of extreme weight and consequence in this connection. The seizing of Venezuelan war vessels and the bombardment of Venezuelan ports by Great Britain and Germany have been cited by Mr. George F. Tucker, of the Boston Bar, in his excellent treatise upon the Monroe doctrine, one of the most instructive and concise expositions upon the subject that I have ever read, as one of the first attempts in history to enforce commercial demands by virtual acts of war. Why did we not interfere in this case? This was an excellent opportunity to put the new doctrine into practical execution. We desisted because Great Britain and Germany both assured us that it was not their purpose to take permanent possession of Venezuelan territory. Under the new dispensation it was a *casus belli*, and it comes distinctly within the President's proclamation. Under the President's well-chosen terms, it was a

case in which the United States immediately became a party in interest, but our failure to interfere is demonstrative proof that we did not consider any attempt short of an attempt to subvert the autonomy of Venezuela as any breach of the Monroe doctrine or of any doctrine incorporated in our diplomatic code.

The third episode is the strongest of the three. For an offense to her dignity England levied a fine of \$75,000 upon Nicaragua. Upon failure to pay the fine, British ships of war appeared at Corinto and armed forces took possession of the town. It was an unnecessary and unjustifiable proceeding upon the part of Great Britain, and here was an opportune occasion to summon the specter of Monroe to revisit the pale glimpses of the moon.

Frantic efforts were made to induce the State Department to act, but it stood by with grim and resolute silence and never sent a political economist or an auditor or an adjuster to apportion the revenues of Nicaragua, but permitted the emaciated Republics of Costa Rica, San Salvador, and Guatemala to subscribe a sufficient sum to liquidate the indebtedness. This was a defiant act upon the part of Great Britain, close to our own borders, in the haunted churchyard of the Clayton-Bulwer apparition, but it never disturbed the tranquil slumbers of Adams and Monroe, and they never for a moment left their sepulchers to harrow up our souls or unfold the secrets of their prison house. I think that I have now established two propositions:

First. That the President is in error when he states that "we are within our rights and other governments are within their rights when they actively intervene in support of the contractual claims of their citizens."

Second. That he is equally in error, if we are to be governed by precedent, when he states that "upon the seizure of a custom-house to enforce claims recognized by international law

in South or Central America we become a party in interest under the Monroe doctrine, and must prevent this action upon the part of foreign governments."

This brings us to a review of what this new doctrine really is, and it reveals a condition that will contribute largely to the entertainment of those who investigate it. We must realize that this new Monroe doctrine is strictly a financial doctrine. The tragic figures of Bolivar and Miranda and a hundred other heroes who swept up and down the Spanish Main, have disappeared from view, and the Santo Domingo Improvement Company and the Westerdorps, of Amsterdam, and the Messrs. Bichoffscheim & Goldschmidt now appear upon the scene. *'Arma virumque cano* is an epic dream. The theme is money, the legend is cash, and the foreign hordes who are advancing into the State Department are a syndicate of relentless mercenaries and money-lenders who traffic in calamity, look upon national misfortunes as so much merchandise, and who for a venal profit would call a vendue, and auction to the highest bidder the liberties of mankind.

Look at the situation for a moment and see whether I am exaggerating it. Let us take the Dominican complication. How did the Dominican indebtedness originate? Let me give you one item of it. I read from the thirty-first annual report of the Council of the Corporation of Foreign Bondholders, incorporated by an act of Parliament July, 1898:

1869—Six per cent. loan for £757,700. The Government of Santo Domingo entered into a contract with Mr. E. H. Hartmont, by which the latter agreed to provide a sum of £420,000 for the construction of roads and railways of which £100,000 was to be retained by him as compensation, the nominal amount of the loan to be fixed by the contractor. The Government on its part undertook to pay, for the service of the interest and sinking fund, an annuity of £58,900 in half-yearly installments, for twenty-five years. Messrs. Peter Lawson & Co., acting for Mr. Hartmont, accordingly issued in London £757,700 in bonds secured upon a first charge on the customs duties of the ports of Santo Domingo and Puerto Plata, the guano royalties and the revenues arising from the forests and mines of the Province of Samana.

The bonds were redeemable in twenty-five years by a 1½ per cent. accumulative sinking fund. The issue price was 70 per cent., but at this price the loan received little support from the public, and was subsequently disposed of at rates ranging from 55 to 50 per cent. to Messrs. Bichoffscheim & Goldschmidt and others, by whom they were later disposed of to the public. The Government only acknowledges receipt of £38,000. Mr. Hartmont, however, asserted that he tendered personally to the Government £211,110, but that it was not accepted owing to negotiations for annexation in progress at that time with the United States. Interest on this loan was paid for three years, but it was stated that these payments were made by the contractor and not by the Government.

What do you think of this? One hundred thousand pounds to Mr. Hartmont for negotiating the loan, the whole loan taken by Messrs. Bichoffscheim & Goldschmidt for 50 per cent., and Santo Domingo paid the sum of £38,000 out of the transaction, for which it gave its bonds for £750,700 and agreed to pay for interest and sinking fund £58,900 a year, £20,000 a year more than the whole amount of principal that it received. And this, shades of Monticello! is what Jefferson contemplated as the most momentous question that had agitated the Republic since the Declaration of Independence.

And this is the subject over which we are to have war. What a glorious war this will be! From Salamis to Trafalgar no such war was ever fought before. On the one side, Belgium's invincible armada. On the other, the converted scows and rowboats of the lamented Morales. Every war that has been waged either upon sea or land has always involved some principle. This will not only involve some principle, but it will involve a large amount of interest. The battle cry of the British navy has been "England expects every man to do his duty." This battle cry shall be "Belgium expects every man to collect his money." The dying words of Lawrence were "Don't give up the ship, boys." Here the flagship shall signal to the fleet, "Don't give up your coupons, boys." And as the battle closes the valiant crew of brokers, bankers, underwriters, and promoters, paraphrasing the thrilling words of Perry, can

flash a cable to the Westerndorps of Amsterdam: "The revenue cutters and the custom-houses of Puerto Plata and Monte Christi have fallen. We have met the enemy and they are ours. Advance and bid on Dominican bonds."

While I am upon this branch of the subject let me refer to a statement lately made to the Baltimore Sun in a communication from its Washington correspondent that contains an interesting extract from the report of the corporation of foreign bondholders. This shows the effect that this new policy of the President has had upon the price of the securities of these American Republics, and which reads as follows, showing the rise in these investments since the beginning of this agitation. An appreciation of this sort would generally be a benefit, but in this case it is an absolute detriment, because it compels these governments to settle their obligations at a price far overreaching the speculative figures at which they were purchased. This table gives the prices of the bonds of eight of these countries at the end of September of each year:

Countries.	1901.	1903.	1904.	1905.
Colombia	14	24½	24	44
Costa Rica A bonds.....	16½	22	26	56
Costa Rica B bonds.....	15	19	19¼	46
Guatemala	13	21	24	39½
Honduras	5	4¼	6	13
Nicaragua	57½	60½	59	79
Paraguay	23	29	35	50
Uruguay	49½	58¾	59½	72
Venezuela	26	32¾	42	51

I will tell you what I am willing to do. The Monroe doctrine is a Democratic doctrine, but I am perfectly willing to stand upon a Republican construction of it. You may search through every volume and pamphlet that have ever been written upon this subject, and in no single one of them will you find a more concise, and at the same time, a more comprehensive definition of what the Monroe doctrine really is, and what

it was intended to be than you will in its exposition by Secretary Seward in the following language. I read from the instruction of Mr. Seward to Mr. Kilpatrick, our Chilean Minister, in 1866:

The Government of the United States will "maintain and insist with all the decision and energy which are compatible with our existing neutrality that the republican system which is accepted by any one of those (South American) states shall not be wantonly assailed, and that it shall not be subverted as an end of a lawful war by European powers;" but beyond this position the United States Government will not go, nor will it consider itself hereby bound to take part in wars in which a South American republic may enter with a European sovereign when the object of the latter is not the establishment in place of a subverted republic of a monarchy under a European prince.

We have lately had an exposition of this doctrine, however, which proceeds a step further than any announcement that has ever been made upon this subject, and it comes from no less distinguished a source than the Secretary of War, as capable an adviser as the President could possibly select, and who, by reason of his integrity and intellectual power, has maintained the respect and confidence of his countrymen, regardless of party, in the commanding positions he has occupied in their service. Secretary Taft, in the frank and candid manner that generally characterizes his public utterances, in an address lately delivered before the Republican convention of Ohio, speaking of our relations with Santo Domingo, says we are to take temporary possession of the island as receiver. I have looked carefully over the various provisions of the Constitution of the United States, and I find no clause that empowers this Government to act as a receiver for any other government. It might be supposed that through some inadvertence or error on the part of the printer it was omitted from the original proof sheet of the Constitution, but in examining the debates of the convention and the notes of Mr. Madison I am unable to discover that there was any discussion of this receivership matter in that body. This is a new project, therefore, and

heralded by so high an authority it is worthy of consideration. The Secretary of War never makes a suggestion, even at a feast or a convention, that does not carry weight with it, and we must not reject this proposition simply on account of the novelty of the conception. The Senator from Indiana, as I shall presently show, claims that we are a trustee for all the uncivilized nations of the earth, and now if you add to this, that in the meantime we are to act as receivers for them, you confer upon us a duty that is by no means a sinecure.

I would like to know who will act as receiver? It will evidently be impossible for Mr. Taft to perform these functions. As Secretary of War, upon frequent occasions *ex officio* Secretary of State, constructive governor-general of the Philippines, and, in the absence of the President, Acting President of the United States, I am quite sure that he has not the time to act as receiver for all the impecunious people on this earth. We will, therefore, evidently have to provide a new portfolio, to be known as the "department of foreign receiverships," and a new Secretary to be known as the "secretary of foreign bankruptcy." This official will, undoubtedly, have a sufficient amount of work to occupy his time, because there are a large number of people in the territory to be covered ready to go into the hands of a receiver, from Yucatan to Tierra del Fuego. The question arises: Are these receiverships to be temporary or permanent? Take the receivership of Santo Domingo. Is it for the purpose of reorganization or liquidation? If for the former purpose, how long will it take to reorganize its finances, and if it is permanent in character, who is ultimately to become its distributee? And then comes the serious question: Who are our clients in this controversy? In Santo Domingo, we claim that the Government ought to be supported, because it is in favor of protecting American interests. In Venezuela American interests were with the revolutionists. Is this to be our policy—that we are to be allied with

the party that is in favor of American interests? Is it not time, I appeal to you, to call a halt in this entire program? Are we not trying to accomplish too much within a brief period? Are we not venturing beyond our limits as a world power and intruding officiously into affairs that do not possibly concern us.

I would also like to know under what clause of the Constitution we derive the right to act as receivers and take possession of the custom-houses of other countries. I would be obliged to some Senator upon this floor to select the provision that confers this authority upon the Executive. If this is an Executive function I shall be extremely grateful to anyone to point me to this article that so defines it. Make no mistake about this. We are now in possession of the custom-houses of Santo-Domingo and collecting their revenues. Please give me the warrant and precept under which this process has been issued. If there is a statute for it, let me have it, and I will ascertain whether there is any sanction for the enactment. If it is a custom, where and when has it ever been practiced or pursued? Is it not a fact that among all the interpreting decisions of the Supreme Court, among all the archives of the State Department, there is no precedent or example that justifies this assumption of authority? I am not fastidious or technical upon this point. I am not what you call a strict constructionist of the Constitution, if by strict construction you mean that I would sacrifice its intention to its phraseology or its spirit to its letter. Give it now the broadest exposition that it can stand, the most liberal interpretation that it is capable of, treat it magnanimously, as the Supreme Court has done in its various revisions and translations, and I challenge you to find a single grant or franchise it contains that justifies this usurpation. I am not criticising the President now. If he has made a mistake, he has done so with a love for his country and a devotion to its people, and not for the purpose of personal aggrandize-

ment, but, in all justice and fairness, has he not fallen into the gravest possible error in supposing that he has the right to execute a treaty before the treaty itself is ratified? It is childish to assert that the Senate is jealous of its rights or its prerogatives. That is not the point. The point I apprehend is that you, as the representatives of your States, will see to it with unabated vigilance that there is no intrusion by the Executive upon legislative functions and no encroachment upon constitutional limitations. I have no feeling, certainly no partisan feeling, upon this matter. Perhaps what has been done has been done for the best, but I want to avoid the precedent, because precedents live forever and bad precedents make good law. We are dealing now with a most important branch of our system.

This is the dead line of the Constitution, and the slightest trespass is fatal to the organic life of our Government. The limitation upon the Executive power is the keynote of the instrument, and when once you rend that cord in twain you destroy the delicate adjustment of the master's hand. It is the implied covenant that underlies the grant. It was the pillar of fire that led us through the stormy days of the state conventions to the shores of our deliverance. All the guarantees of the charter, habeas corpus, civil rights, the liberty of the press and religious freedom pale into insignificance before its light, and, if I am correct in the position I am assuming, I would like it once and forever understood that no treaty with foreign nations and that no compact, convention, or protocol in the nature of a treaty shall be performed and carried into practical effect, and no custom-house shall be seized, no revenues administered, no *status quo* established by any minister or military commander until the act of the agent is confirmed by the principal and the negotiations of the President are submitted to the only body under the Constitution that has the right to reject or ratify them.

Look for a moment at the situation of a number of the States that are involved in these controversies. Of course, I am not speaking now of the states where order prevails and whose governments are stable and responsible. We know that they are in a condition of constant upheaval and are resting upon a political volcano. I will not dignify by the name of revolution, the sedition and turmoil that since their liberation have raged within their borders. In some of them the public franchise is a mockery and a travesty upon republican institutions. In the city of Buenos Ayres, for instance, at the last election, with 800,000 population, 2,000 votes were cast, and they were largely the votes of persons who had been dead and buried for an indefinite period of time. In a number of instances their presidents are military dictators whose chief ambition seems to be to acquire as large a fortune as possible from the public funds before the time arrives for their assassination.

It will be utterly impossible for us to follow our citizens into these realms and inferentially become the ally of every rioter or usurper who regards the domain of his country as his private emolument, and who is willing for a consideration to part with every concession upon its soil, with a full knowledge that they will be forfeited by the tyrant who succeeds him. Those who are in control are entirely justified when they announce to us that we have no right to interfere with them. There is a ruler now upon the republican throne of Venezuela, "half patriot, half brigand," who extends a hospitable invitation to the navies of France and the United States to bombard him, and while the whole world is smiling at the grotesqueness of his blustering pretensions, when you analyze the philosophy of the situation, he was unqualifiedly right. He proceeded to forfeit the concessions of our citizens, claiming that they were in league with his opponents. We demanded arbitration, and when he took refuge under the principle that the controversy was pending in the Venezuelan courts we answered him by

saying: "You own your courts, and you can induce them to render any decision that you desire. We are, therefore, not bound by their judgment, and we shall bombard you if you do not submit to arbitration." Mr. President, we might as well admit that he is on the right side of the question and the law is with him. Corrupt or not, we know that these concessionaires must submit to the judgment of the courts that have jurisdiction over them. We can not bombard Venezuela because these tribunals have rendered an improper decision. Let us reverse positions for a moment. Here are hundreds of decisions flooding us every day in this country, from county, circuit, and municipal courts, and from district, appellate, and supreme tribunals. Suppose that every jury that rendered an improper verdict, and every judge who pronounced an unsatisfactory decision were to be bombarded. Why, the land would reverberate with the roar of cannon, and the firmament would be draped in fire.

The President takes the ground that these States should pay their honest debts. That is the proper ground to take. If they repudiate them, says the President, we will intervene and compel them to fulfill their obligations. This was the purpose declared by him in one of the earlier communications made upon the subject, which at the time was profanely criticised as policing South America. The method of intervention that we were to resort to was the seizure of their custom-houses and a virtual assumption of suretyship for them, because it stands to reason that the moment we come into possession of their revenues we can never abandon their administration, but must continue their collection until the indebtedness is liquidated. This makes us the guarantor of these claims. This will force them to be honest, says the President. I humbly take a position that is diametrically opposed to this doctrine. I say that such a policy on our part will deprive them of every motive for honesty, and will close up for them every avenue of ambition. I

would let them realize that we do not intend to stand sponsor for a dollar of their indebtedness and that, like every other people, they must perform the obligations of civilized society, and that, if their property is rightfully seized, upon their failure to do so, we do not intend to intervene unless there is an attempt to subvert their institutions. This is the only method by which you can inculcate proper lessons of national honor and good faith. Then whenever a rioter engages in a revolution he will understand that he can not seize a custom-house for his own emolument, because that is what a South American revolution generally means, until he secures the claims of foreign creditors. There will be less revolution then, because when you take away the custom-house of a South American revolutionist you take away the inspiring motive that fans his patriotism into flame. I have the strongest friendship and the deepest sympathy for these people. Their ruling classes represent a spirited and chivalric race, and I cherish the fondest hopes for their future welfare.

Let me take the liberty of telling them, however, that they will never emerge from bondage until they become a reliant and self-dependent people; that they will never take their place among the nations of the earth by surrendering their custom-houses into the hands of foreign constables and collectors; that they will never be recognized as factors in the world's progress until they grasp the rudimentary principles of national honor. Until they learn that there can be no fellowship or communion between liberty and corruption, and that a republic whose rulers are venal and whose assemblies are purchasable constitutes the most abject form of despotism, and though the bosoms of their people may pant with a love of liberty, though they may ostensibly exercise the privileges of freemen, their very suffrages are the emblems of servitude, and they themselves are but bondsmen and slaves, "fancied freemen amid the clanking of their chains and imaginary monarchs beneath the infliction of their keepers."

So far as I am concerned I am in favor of letting all the world understand what we mean by the Monroe doctrine. There ought to be no secret or mystery about it. Let me give you my definition, and I appeal to the historic evidence I have given in support of its accuracy:

First. We mean that no foreign power shall forcibly establish any monarchical government upon the face of the American continent.

Second. We mean that every republican form of government upon this hemisphere shall remain intact, subject alone to the free will of its own people.

Third. We do not and we can not mean that foreign governments within these limits shall not enforce their just demands against American nations.

Fourth. Once and forever we do not mean that we contemplate any protectorate over any other American nation.

Fifth. We can not possibly mean that when a foreign government, in the enforcement of rights recognized by the law of nations, subjects the revenues of one of these States to its control, it is our duty to intervene and become the guarantor of its obligations. What we do mean is, that when the process reaches beyond that point and there is an attempt to subvert republican institutions, that then, under the Monroe doctrine, we will intervene and protect these states from aggression.

Sixth. We do not believe that the seizure of a custom-house, in order to obtain indemnity for a wrongful act, is a permanent invasion of territory or a subversion of republican institutions within the meaning of the Monroe doctrine, and that upon an attempt of this sort being made, without any further encroachment it becomes our province to interfere by force and prevent it.

Seventh. And lastly, what is more important than all, we repudiate the doctrine that the flag follows a contract, and

that we propose by war or by the menace or threat of war to enforce the performance of contractual obligations entered into by foreign governments with our own citizens.

If we abide by these maxims we will inculcate two lessons of imperishable value. In the first place, we will announce to these republics that they must pay their honest debts, that they have no right to repudiate their obligations, and that they can not involve this Government in their settlement or look to us to become the collectors and distributors of their revenue. In the second place, we will announce to our own citizens, that when they enter upon transactions in these States, while we will protect their property and their liberty against wrongful invasion, so far as their contracts are concerned, they are subject to the laws of the jurisdiction in which they are to be performed and that they shall not appeal to us to make good their profits, and by armed intervention, insure the completion of their enterprises.

This is my ritual. This is the orthodox ritual. While I am not a devotee at the shrine of antiquity and am always willing to accept any new doctrine that may be an improvement upon the old one, no matter how startling it may be, in this particular I stand by the ancient confession of faith and do not propose to become a proselyte from its altar. I believe that, however well intentioned the present purpose may be, a financial protectorate over any of these republics will gradually lead to a political protectorate over them, and then, by insidious process, to annexation. Thus believing, I am unwilling to fashion the interpretation to the emergency, and standing upon a basic principle I do not propose that every zephyr that fans from the Caribbean shall sway and sweep me from the rock to which I am lashed. I do not believe that, looking at this subject calmly and practically, there is the slightest danger of any foreign government forcibly seizing the custom-houses of these states. The President's fears upon this subject will prove to

be unfounded. He is generally apprehensive that we are continually in danger of war, and possessed of this belief he properly concludes that we ought to be continually making preparations for war in time of peace. I do not believe that any European or Asiatic power is anxious, either to enter upon a conflict with us or with any state whose political autonomy they know we will uphold and protect. Every government on this earth knows that we will not permit any of these republics to be subverted or deprived of their liberty or political rights. If such an attempt was made, there would be genuine war, but foreign powers have no designs of this sort, and are not premeditating any such proceedings. They have sufficient troubles of their own without hazarding such a perilous undertaking. They all desire our good will and not our enmity. This whole issue is a dead issue. It has been buried so long that we ought not to drag it from its charnel house. I would suggest, with great respect, that whenever a council of adventurers and speculators notifies us that war ships are on their way to collect their debts, let us solemnly resolve that we will not become unduly agitated, but will exercise a proper degree of self-restraint and patience until the actual demonstration takes place.

I would like it understood that I am not opposed to this Government making proper efforts at all times through arbitration or the intervention of its friendly offices to adjust and compromise controversies that other nations are engaged in. If this is what we mean by being a world power, I approve of it in the highest degree. Not only this, but I am in favor of advancing American interests and securing them the same rights and privileges that other nations possess in foreign lands. I have always thought the best way to accomplish this, however, was to open the highways of the ocean, so that our ports should be cleared for the commerce of mankind, and so that the handiwork of the American mechanic and the fabric of the Ameri-

can mills could cross the sea and compete with the product of every country in every metropolis and emporium of the civilized world. Be this as it may, let it be understood that I would place no obstacle in our way as a world power, if we mean by this equal rights with every other people upon every avenue of trade and commerce, and equal opportunities for American enterprise into whatever distant regions its thrift and industry may desire to venture. So far, so good. But if we mean by becoming a world power that we are to take part in all the conflicts between other nations, that whenever a country is to be stolen we shall have an equal opportunity to participate in the plunder, that whenever the territory of a defenseless people is to be partitioned that we are to have a share of the booty, that whenever a national felony or deed of violence is to be committed that we are to have a hand in the pillage, that we are to have equal rights with all the other robbers who have heretofore purloined the fairest portions of the earth, that whenever a helpless State is unable to protect itself and other governments are ready to prey upon it that we must speed our battleships to the feast and maneuver as a world power for an allotment of its possessions and a dividend of its liberties; if this is what we mean by a world power—and it looks to me as though this is what we do mean—then by whomsoever conceived and by whomsoever executed, regardless of the converts it leads to the altars of our institutions or the captives that it brings with gilded manacles into our realms, I denounce this whole crusade against human rights as a “policy that is at war with the providence of God, and makes a mockery of religion’s holiest offices.”

I am now about to conclude. In no sentiment that I have expressed have I been actuated by partisan motives. As much as I cherish the principles of my party, I could subordinate the whole of them when they conflict with the welfare of my country. The President and every officer under him to whom

governmental policies have been committed have faithfully performed their functions, and they deserve all the commendation that has been accorded to them by the tribute of a united people. Every advance that we have made under their administration has, received with glowing emphasis and regardless of party lines, the grateful recognition and acknowledgment of our countrymen. The whole danger that exists with us today is in attempting to accomplish too much, and involve ourselves in cares and controversies that will only distract and complicate us. There must be a limit to our zeal and a boundary line to our aspirations. It is not necessary that every day shall dawn upon some new accomplishment.

Some years ago in this Hall, the Senator from Indiana, Mr. BEVERIDGE, in an address replete with power and eloquence, gave expression to the following sentiment:

We will not renounce our part in the mission of our race—trustee, under God, of the civilization of the world. And we will move forward to our work, not howling our regrets like slaves whipped to their burdens, but with gratitude for a task worthy of our strength, and thanksgiving to Almighty God that He has marked us as His chosen people, henceforth to lead in the regeneration of the world.

No member of this body is imbued with deeper religious convictions than I am, but I do not believe in this doctrine that we are trustees under God of the civilization of the world. The Senator from Indiana will find no such decree as this enrolled in the chancery of heaven. When the time arrives, which I hope may be far distant, and he has passed through the eternal gates, he will search in vain for such a document as this among the archives of the celestial regions. If we are trustees, under what instrument do we hold? We are not a judicial trustee. We may, perhaps, be a constructive trustee, *de son tort*. One thing is sure, we are not a conventional trustee. Search the Constitution, the origin of the grant, and the Magna Charta of our title, and you fail to find in any one

of its provisions a justification for the exercise of such an authority. It is just this unfortunate confusion between the power of the individual and the power of the Government that has cast upon us, the onerous burdens that we now assume. This Government is not a foreign missionary society or an institution for the feeble-minded, and however commendable the efforts of individuals may be in this direction, this Government as a government has no such functions to perform. This is our whole trouble. You start from a false premise, and then you conclude that it is our duty as a trustee to march around the outposts of civilization, to patrol the waters of the world, and wherever we can find a feeble or degenerate race to claim them as our *cestuis que* trust, to appropriate their possessions and then, *jure divino*, as the chosen people of God, impose upon them our sovereignty. My heart goes out with thrilling love and sympathy for all those self-sacrificing souls who are spreading the solace and comforts of religion in foreign lands, who, courting danger and affliction, have gathered around the emblems of their faith the forsaken children of mankind, and upon every path of human suffering have ministered to the agonies of despair; but I can never acquiesce in the proposition that this is a governmental function, and that it is our duty to deprive a single race on earth, no matter how depraved and degenerate it may be, either in the interest of religion or civilization, of the slightest fragment of its possessions or the slightest vestige of its liberty.

I am with the slave in every darkened corner of the globe where he is struggling to be free, and I hope the day will come when every government that is built upon the bowed bodies of its subjects may disintegrate, and that upon its ruins republican institutions may arise. Let me say to you, however, Mr. President, as deeply as I love my country, with all the devotion I would lay upon her altars, with a fervid reverence for her flag wherever its colors greet the eye, I would rather see that

flag lowered and trampled upon than used as a pirate's ensign, and raised, not as an emblem of honor, but as an instrument of terror and oppression to the helpless and enfeebled races of mankind.

AMENDING THE INTERSTATE COMMERCE ACT.

During the long debate in the first session of the Fifty-ninth Congress upon a bill regulating railroad rates, Senator Rayner on May 11, 1906, contended that orders of the Interstate Commerce Commission should not be set aside by the courts unless it could be shown that the Constitution was violated.

This raises the distinction between what has been called the broad and the narrow review. If I may be permitted to say so, I think both those words are misnomers and that the proper names are "the constitutional" and "the statutory review;" the statutory review, of course, always including the constitutional review.

I am in favor of the constitutional review. The review that the President of the United States has submitted to us is the broadest sort of statutory review; and I think, as I shall presently try to demonstrate, that whatever may be the result of the vote upon this amendment, this distinction ought plainly to get into the Record, so that we may all know how to vote upon it, and that the people may understand the distinction.

I wish very much that the President of the United States—and I say it with great respect and deference—had not interfered in this legislation, but had permitted us to settle this case right here in this body, where the responsibility devolves. I do not say, Mr. President, that anyone has set a trap for the President of the United States. I would not make a declaration of that kind upon this floor. But I do say, and I say it again with the greatest respect and deference to the President,

that the President, unfortunately, is so constituted that he can not look at a trap without fooling with the spring. Last week, after he was caught in this trap for a day or so, in some way or other he worked his way out of it, and then he kept on looking at it and walking around it and walking in and out of it until he was caught beyond all hope of escape. Now his party friends and his party enemies are vying with each other as to which one of them can get in first and participate with him in his gratuitous captivity.

A few weeks ago—four or five or six weeks ago—he sent to us as his envoy extraordinary the Senator from Kansas, Mr. LONG, and he intrusted to him the mission of a constitutional review. Last Friday, without notifying the Senator from Kansas that his credentials had been revoked, he appointed in his place, a minister plenipotentiary, the distinguished Senator from Iowa, Mr. ALLISON, with the mission of a broad statutory review. Now, I understand perfectly well that the Senator from Iowa did not seek this appointment. I am informed that he was peacefully reposing in nocturnal innocence when this appointment was made, and when these mighty honors and this distinguished servitude were thrust upon him. At any rate, we have two reviews sent here by the President—the one in the hands of the Senator from Kansas, and the other in the hands of the Senator from Iowa—and each of them in deadly conflict with the other.

I say here, in passing, that each of these ministers is equally well accredited. The certificate of the Senator from Kansas had the impress of the royal authority, and the testimonials of the distinguished Senator from Iowa not only bear the imperial seal, but they are authenticated in a manner that ought to give them absolute authenticity by the coat of arms of the Senator from Rhode Island, Mr. ALDRICH.

Mr. President, we understand what all this means here, but the people do not understand it. We understand that the

President is no longer caressing the junior Senator from Iowa, Mr. DOLLIVER, as the Senator from Kansas, but that he has transferred his affections and is now clasping to his bosom, with the fondest and most fervent devotion, the senior Senator from Rhode Island.

The President tells us that these two reviews which he has sent in here are one and the same thing, but, Mr. President, they are as widely different as it is possible for two divergent propositions to be. The one is the review under the Constitution, which you can not eliminate without invalidating your law. The other is the broad statutory review, which permits the courts to try the cases *de novo* and in the same manner as if no such body as the Interstate Commerce Commission had ever existed upon the face of the earth.

The one, the review of the Senator from Kansas, confines the court within a given compass—the compass of the Constitution. The other extends to the utmost limits of their jurisdiction. The one leaves the rate-making power with the Commission. The other, as I shall presently show, transfers the whole controversy to the court and renders the Commission absolutely impotent and powerless to accomplish the object and purposes of its creation.

Let us see whether I am right or not. I will guarantee to any probationer or apprentice in his profession, if this review passes and he will take this case into court, I will stand surety and sponsor for him that the courts, without hesitation, will decide that they have a right to try the whole case from its inception to its completion as if no proceeding whatever had taken place under it.

What is this review? The original Hepburn bill gives the venue. Giving the court the venue does not give it jurisdiction.

I say, therefore, Mr. President, when you give the full venue

and full jurisdiction, all that the courts will do will be to take up the case and try it over again. There is nothing else for them to do. If anyone is in favor of constitutional jurisdiction in a court, why not say so? Why not provide in this amendment as the President first provided? Just let us look at the President's first amendment:

The court is to determine whether the order complained of was beyond the authority of the Commission or in violation of rights secured by the Constitution.

That is the first amendment. That is all right, and I am willing to vote for it. If the President had stood his ground and not surrendered so quickly as he did, we could have passed this amendment. This is the constitutional amendment.

The other amendment is under section 2 of Article III of the Constitution. You are distributing jurisdiction and you are giving them unlimited jurisdiction, because you are giving them unlimited venue, and you make your jurisdiction equivalent to your venue. In other words, whenever you give a venue, you give jurisdiction, and you give a venue in every case where you go into court to set aside, sustain, enjoin, or annul an order. Therefore, you have given the broadest statutory jurisdiction it is possible to give. That is beyond any idea contemplated by any Senator who has been in favor of a broad review. It is an absolute surrender upon this entire subject, and I want to congratulate the Senators who are in favor of this broad review upon having achieved this signal victory. And in congratulating them—and I am not impugning the motives of any one in favor of the broad review—I want to say that the President ought not to have changed his ground as precipitately as he has done. Yet I want to congratulate them on the signal victory they have gained, and I want to congratulate every railroad president in the United States and all their conquering retinue of counsel upon the great triumph they have attained.

It is an unfortunate thing, Mr. President—deplorable—that just at the very moment when political considerations were being eliminated; when elements in both parties were uniting upon a proposition that was acceptable to the people, and when the prize was within our hands, one we had been struggling for for months, that the President, through executive interference upon the most vital point in the bill, should compel his party and compel us to accept a subterfuge and proclaim an unconditional surrender.

TREATY-MAKING POWER OF THE FEDERAL GOVERNMENT.

This argument was addressed to the Senate on December 12, 1906, in support of Senator Rayner's resolution holding that the United States has no right to enter into a treaty affecting the public school systems of any of the States of the Union.

The proposition covered by this resolution is, to my mind, a most important one. The President has stated in his message that the Federal Government possesses some power in connection with the subject-matter set forth in the resolution, and that everything within his power shall be done, and all of the forces, military and civil, of the United States, which he may lawfully employ, will be employed for that purpose. It is very important, therefore, that we should know, and the country should know, and the President should understand, whether he has any power in the premises at all. It is quite a serious matter, in view of the great calamity that has lately befallen the city of San Francisco, for the President to contemplate the bombarding of the city at this time and to declare war against the boards of county school trustees of California, if there is no jurisdiction or pretext upon which such ferocious proceedings can be undertaken.

With great respect and deference to the President, he is exercising a great many functions—executive, legislative, and judicial, lawful and unlawful, constitutional and unconstitutional. If he is possessed of the idea that he is the supervisor of all of the public schools of the various States of the Union, and he seems to be impressed with this idea, because in the very last paragraph of his message he recommends to Congress the establishment of shooting galleries in all of the large public schools of the country, we must either disabuse his mind of this fancy, or we must let him know that we agree with him as to the omnipotence of his jurisdiction. If he can take possession of the public schools of California and compel the State to admit to them Japanese students, contrary to the laws of California, he could, with equal propriety, send us an amendment to the Santo Domingo treaty, and demand the admission of the negro children of Santo Domingo into the white schools of South Carolina or of any other State of the Union. Of course, if the people have come to the conclusion that everything that the President recommends is right, then there is hardly any use in contesting any of his propositions or recommendations, and instead of conferring upon him the power to give Congress information of the state of the Union, we might confer upon him the function of furnishing his own peculiar views upon the entire state of the universe, and recommending any improvements or changes in the general plan of creation that he may deem expedient, from the cradle to the grave. In fact, the President, upon page 29 of his message, anticipates the cradle, and makes a recommendation upon the state of the Union that tends to place in his hands the establishment of the birth rate of the country. Now, if we can only supplement this function by giving him complete jurisdiction over the death rate, we will have a ruler whose ubiquity is uncircumscribed, and whose unlimited possibilities are beyond the reach of human contemplation.

I believe that there is a sufficient residuum of common sense and independent thought in the American people to keep the Executive within the prerogatives of his office, and to let him quietly and respectfully understand that the Executive chair is not exactly the place from which to deliver exhortations or a course of didactics upon either the natural rights or the infirmities of the human race, and that in his messages and recommendations he ought to confine himself to the functions prescribed by the Constitution.

I desire to say, in passing, that I coincide with everything that the President says in praise of the people of Japan. In the war between Japan and Russia my sympathies were entirely with the Government of Japan, and whatever he says in honor of its marvelous race meets with my own hearty commendation. I always thought it was a great shame that, through the kindly and well-intentioned offices of the President, Japan should have been overpowered in the conference room when she had been victorious in every battle upon the land and on the sea. I think that the dauntless courage and the almost superhuman heroism, against overwhelming odds, of her military and naval forces is without a parallel upon the pages of ancient or modern history. I propose to discuss the question under consideration entirely outside of the particular circumstances that environ it, upon general grounds of constitutional law, and certainly with no feeling of hostility upon my part toward this wonderful people with whom this controversy has arisen.

In the brief argument that I shall address to this body I shall plant myself upon two propositions:

First, that there is no provision whatever in the treaty with Japan that confers the right that the President speaks of, or gives to the Government of Japan the privileges that it claims in connection with the public school system of California or of any other State.

Secondly, if there was such a provision in this treaty, or any other treaty conferring this right, the treaty would be void and without any authority upon the part of the United States to make it, and in violation of the Constitution and the treaty-making power of the Government.

The first step that it is necessary for me to take in this discussion is to quote the provisions of the treaty with Japan that have been held to be applicable to the subject in hand, the ratifications of which treaty were exchanged by the respective Governments on the 21st of March, 1895. I will ask the Secretary kindly to read those provisions. It will take but a moment.

The Secretary read as follows:

ARTICLE I. The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property.

They shall have free access to the courts of justice in pursuit and defence of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.

In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation. The citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and, subject to the laws, ordinances and regulations, shall enjoy the right of private or public exercise of their worship, and also the right of burying their respective countrymen, according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose.

They shall not be compelled, under any pretext whatsoever, to pay any charges or taxes other or higher than those that are, or may be paid by citizens of any other nation.

The citizens or subjects of either of the contracting parties residing

in the territories of the other shall be exempt from all compulsory military service whatsoever, whether in the Army, Navy, National Guard, or Militia; from all contributions imposed in lieu of personal service; and from all forced loans or military exactions or contributions.

ARTICLE XIV. The high contracting parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either high contracting party has actually granted, or may hereinafter grant, to the Government, ships, citizens or subjects of any other State, shall be extended to the Government, ships, citizens or subjects of the other high contracting party, gratuitously, if the concession in favor of that other State shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other upon the footing of the most favored nation.

There is not a clause or a line of this treaty that contains, by expression or intendment, the slightest reference to the public school systems of any of the States of the Union, or confers any rights whatever upon the citizens of Japan to enjoy the privileges of their public educational institutions. There is not a clause or a line, although I understand that the President has been advised to the contrary, that, to the professional mind, would admit of such a construction. The most liberal interpretation of any of its terms does not allow such an interpolation or insertion to be made. The treaty does not even contain the most-favored-nation clause, except in reference to the particular objects that are therein specifically enumerated.

If I have made a mistake upon this point, let some Senator upon the floor, or some of the President's legal advisors upon the treaty, refer me to the clause that carries with it such a construction. Let the President elucidate his message upon this point and give us the language in the treaty that authorized him to state that he had any power or jurisdiction over this subject whatever. It can not be done, because here is the treaty, and no one arises here to justify his construction of it. If there is any decision in the United States that holds that any of the rights granted by the treaty carry with them the priv-

ilege to the subjects of Japan of even partaking of the advantages of the educational system of our States, let us have that decision. I have examined them all very carefully that relate to treaties, and I find no authority to sustain such a proposition.

Now let me call your attention to a very peculiar circumstance, and that is the Burlingame treaty, which was made with China, because that does contain such a provision. It is only a few lines. The Burlingame treaty with China, which was proclaimed on February 5, 1870, has the following provision in it:

ARTICLE VII. Citizens of the United States shall enjoy all the privileges of the public educational institutions under the control of the Government of China, and, reciprocally, Chinese subjects shall enjoy all the privileges of the public educational institutions under the control of the Government of the United States which are enjoyed in the respective countries by citizens or subjects of the most favored nation. The citizens of the United States may freely establish and maintain schools within the Empire of China at those places where foreigners are by treaty permitted to reside, and, reciprocally, Chinese subjects may enjoy the same privileges and immunities in the United States.

"Of the United States." It does not say "of the States," but of the United States.

The ratifications of the Japanese treaty were exchanged by the respective Governments on the 21st of March, 1895, twenty-five years afterwards, and there is not a word of it in this Japanese treaty. The favored-nation clause does not cover it, because this clause is restricted to the objects that are specified in the treaty, and no one of these objects relates to educational privileges; and even if there had been a provision in the Japanese treaty similar to the one in the Chinese treaty, it would not apply to this case, because the treaty with China confers educational privileges in educational institutions under the control of the Government of the United States, and neither the educational institutions of California, nor of any other State of the Union are under the control of the United States.

The educational institutions of the States are not under the control of the Government of the United States, and, therefore, by virtue of this provision in this treaty, the Chinese enjoy no privileges at all. Therefore, if this clause had been incorporated in the Japanese treaty, as I shall show a little farther on, it would not cover the proposition we are now discussing.

Any of the States may admit any Chinese or Japanese student, or any other sort if they choose, who are in the United States. That is entirely within the province of the State, but the question here is a question of alleged discrimination in the public school system of California. Massachusetts or any other State of the Union has a perfect right to admit any Chinese or Japanese who are here. That does not affect the question, I respectfully submit, that I am discussing. I absolutely deny that the admission of these students into the educational institutions of the State is in compliance with, and in furtherance of, the treaty.

I might rest this entire subject right here, because this is an end of the claim of Japan if the treaty does not, either by expression or intendment, contain the controverted matter, but I have arisen for a larger purpose and a deeper inquiry; and inasmuch as what has taken place here, may occur over and over again under the treaty-making power of the United States, I shall now proceed to the more important proposition, and that is, that this Government has no power under the Constitution of the United States to make any treaty with any foreign Government covering the subject in question, or overriding the legislation of any State of the Union in connection therewith.

Now, let me quote—because I must say that to me it has been the most interesting subject in constitutional law that I have ever examined—the sixth article of the Constitution. It is not an academic discussion; it is likely to occur over and over again with all our oriental possessions, because if the President persists in his purpose, the day will come when he will demand

that he has the right, either under the treaty-making power or under the amendments to the Constitution, to exercise this privilege in connection with the admission of foreign students into the public educational institutions of the States.

Now, one may read this article of the Constitution without understanding it. Just read it. Let a layman read it. It leaves an impression upon the mind of every man who has not studied the Constitution, that the treaty overrides the reserved rights of the States whenever it comes in contact with them. No matter how brilliant the lawyer may be, no matter what his talents or resources may consist of, I do not care for the opinion of anyone who has not thoroughly mastered and analyzed the authorities upon this subject and made the proper discriminations between them:

THIS Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States—

Now, that is the distinction that the extreme school plants itself on, between these two propositions. When it speaks of laws, it says laws which shall be made in pursuance of the Constitution. When the Constitution speaks of treaties, it means all treaties which shall be made under the authority not of the Constitution, but of the United States. I shall, I think, demonstrate within a few moments, that there is no possible distinction in the authorities between these two clauses.

This sixth article, which lies at the bottom of this controversy, reads partly as follows:

ARTICLE VI. This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

I plant myself firmly and unalterably upon the proposition that we can make no treaty that violates any of the provisions

of the Constitution of the United States, that the treaty-making power in the sixth article must be construed *in pari materia* with all the other provisions contained in the Constitution, and if the treaty comes in conflict with any of the limitations of the instrument, the treaty must yield and the Constitution prevail.

As a corollary of this proposition, I plant myself upon the doctrine that any treaty that violates Article X of the Constitution, and infringes upon the reserved rights of the States which have not been delegated to the General Government, and embraces subjects that belong to the States, and that are not necessary to carry out the purposes of the Government as defined in the Constitution, is *ultra vires*, and not within the capacity of the Government to make.

It is my opinion that this subject involves one of the most interesting problems that has ever been before this body, and that the suggestion in the message of the President, with great respect to him, is not of the slightest value here, because, in order to arrive at a proper conclusion upon this important inquiry it is necessary to assiduously examine the great mass of precedents, and authorities, and decisions that have been rendered upon the subject. I am quite sure that I am entirely within bounds when I say that the President has not undertaken this task.

There are two separate schools of construction upon the subject at issue. These schools are professional schools and schools of commentators and text writers upon the Constitution, and it is not entirely accurate to designate them as the respective advocates of national and States' rights systems.

One of these schools claims that the treaty-making power is an inherent element of sovereignty, and though it is a conferred power in the Constitution, it would exist as an essential attribute of this Government without delegation, and that when it is once delegated it need not derive its authority from

the Constitution, and that whenever it comes in conflict with the provisions of a State law or a State constitution, by the terms of Article VI of the Constitution the treaty prevails. Some of the adherents of this school have proceeded to the most unfortunate limits in their construction of the treaty-making power, and have held that this power is superior to the Constitution, and it is not in any manner governed by its inhibitions or limitations.

The second school stands upon the doctrine that the treaty making power exists for the purpose of carrying out the purposes and objects of this Government, as prescribed and defined by the Constitution, and that no treaty is valid that violates the Constitution, or that under its provisions, surrenders the rights reserved and belonging to the States.

I am a disciple of the second school, not alone as a party man, but as a student of Constitutional history, and I proceed now to give the reasons for the faith that is in me.

The most instructive step that I can take in this discussion is to give, in the language of their advocates, the two standards that separate these two political creeds, so that the distinguishing features between them can be clearly and fully comprehended and understood.

Mr. Charles Henry Butler, the present reporter of the Supreme Court, and a man of great learning and industry, in a valuable text-book that he has written upon the treaty-making power of the United States, which I think is mainly wrong in the conclusions that it reaches, but which is full of the most interesting information upon the subject, thus states his own views and the views of those who belong to the first school of treaty-making power interpretation that I have referred to:

First. That the treaty-making power of the United States, as vested in the central Government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that government as an attribute of sovereignty, and that it extends to

every subject which can be the basis of negotiations and contract between any of the sovereign powers of the world, or in regard to which the several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any manner whatever and vested that power exclusively in and expressly delegated it to the Federal Government.

Second. That the power to legislate in regard to all matters affected by treaty stipulations and relations is coextensive with the treaty-making power, and that acts of Congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional, and can be enforced, even though they may conflict with State laws or provisions of State constitutions.

Third. That all provisions in State statutes or constitutions which in any way conflict with any treaty stipulations, whether they have been made prior or subsequent thereto, must give way to the provisions of the treaty, or act of Congress based on any enforcing the same, even if such provisions relate to matters wholly within State jurisdiction.

The tenets of the school in which I have been trained are succinctly stated in a masterly way by that eminent constitutional lawyer, the Hon. John Randolph Tucker, in a report that he rendered to the Forty-eighth Congress, and which reads in part, as follows:

The language of the Constitution of the United States which gives the character of "supreme law" to a treaty, confines it to "treaties made under the authority of the United States." That authority is limited and defined by the Constitution itself. The United States have no unlimited, but only delegated authority. The power to make treaties is bounded by the same limits, which are prescribed for the authority delegated to the United States by the Constitution. To suppose that a power to make treaties with foreign nations is unlimited by the restraints imposed on the power delegated to the United States would be to assume that by such treaty the Constitution itself might be abrogated and the liberty of the people secured thereby destroyed. The power to contract must be commensurate with and not transcend the powers by virtue of which the United States and their Government exist and act. It can not contract with a foreign nation to do what is authorized or forbidden by the Constitution to be done. The power to contract is limited by the power to do. (3 Story, Com. on Const., Sec. 1501.)

It is on this principle that a treaty can not take away essential liber-

ties secured by the Constitution to the people. The treaty power must be subordinate to these. A treaty can not alien a State or dismember the Union, because the Constitution forbids both.

In all such cases the legitimate effect of a treaty is to bind the United States to do what they are competent to do and no more. The United States by treaty can only agree with another nation to perform what they have authority to perform under the constitutional charter creating them. The treaty makes the *nexus* which binds the faith of the Union to do what their Constitution gives authority to do. A treaty made under that authority may do this; all it attempts to do beyond it is *ultra vires*—is null, and can not bind them.

In this admirable report and careful review of the treaty-making power, Mr. Tucker further remarks that—

If the treaty-making power extends to the limits that are claimed for it by the advocates of an inherent right, then a treaty may borrow money, regulate commerce, coin money, establish postoffices and provide for raising armies and navies of the United States, and may thus annul or paralyze all the powers of Congress, and admit a foreign nation to exact, with the alternative of war, a compliance with these sweeping stipulations in the internal government of the people of the United States.

I am aware of the fact that some of the conclusions reached by this eminent statesman in this report, have been assailed at times, but I am also aware of the fact that the main proposition upon which he stands, and from which I have quoted in the first instance, has never been impeached nor impugned by any Federal or State authority that I know of.

I want to proceed one step further in the particular point that I am now discussing, and I desire to address these remarks to the extreme advocates of the doctrine of an "unlimited treaty-making power."

Let me take subsection 8 of section 9 of Article I of the Constitution of the United States, which provides "that no title of nobility shall be granted by the United States." Is there anyone here that believes we would have the right in a treaty to grant a title of nobility to the subject of a foreign government?

Subsection 4 of section 1 of Article II of the Constitution

provides "that no person except a natural born citizen * * * shall be eligible to the office of President." Does anyone here believe that we could make a treaty with a foreign power abrogating this section in its interests?

Article I of the amendments provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Is there anyone of the opinion that we could make a treaty with a foreign nation admitting their subjects to our shores, and then, in the same treaty, provide that they should not have the privilege of exercising their religious belief?

Mr. President, I am talking to the extreme advocates of this doctrine. I am coming to the middle class presently. I am taking now the doctrine of the men who claim that the treaty-making power is an inherent power, and is not circumscribed either by the delegated powers or by the limitations or inhibitions of the Constitution. I will come to the men of more moderate views of the first school in a few moments. I am planting this argument now upon the doctrine that the treaty-making power is an inherent power that is not governed or controlled at all by the Constitution of the United States.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

Is this an inherent power? Is there any power under the treaty-making power, except the power to carry out the delegated powers of the United States? According to Mr. Butler and the various lecturers upon the revised edition of the United States Constitution, who agree with him, it is claimed that the power is not bound by the limitations of the Constitution. I ask, is there anyone here who believes that we could have put a provision into the treaty of Paris providing for a system of slavery in the Philippine Islands? If it is an inherent power, if it does not depend upon the delegated powers,

if it is a sovereign power beyond and above the Constitution; then we can violate every article in the Constitution, and there would be no inhibition upon us at all from violating this particular provision and instituting or continuing, as I believe we have done anyway in a portion of the Philippine Islands—the system of slavery that exists in a certain portion of those islands.

The Federal Government can make every treaty, and the States have given the Government the right to make every treaty that is necessary to carry out its delegated powers, and you must take the treaty-making power in *pari materia* with the delegated powers that are given to the Government. I can not make it any plainer than that. I will give you what Mr. Adams says on that presently, and a number of your friends and some of my friends—Mr. Jefferson and others—and, I think, you will agree with me. I have stated the proposition almost in their identical language. I say that the States have given to the Federal Government the right to make treaties, but they have only given it the right to make such treaties as carry out the delegated powers of the Constitution, and they have never given it the right to make any treaty that interferes with the reserved rights of sovereign States acting within their own borders.

I say, again and again, the States have granted to the Federal Government all their treaty-making powers that are necessary to carry out the purpose of the Government as constituted by the Constitution. That is the exact language of Mr. Jefferson, and I can not improve on it. It has never been improved on, except by Mr. Butler, who says Jefferson has been reversed. Jefferson has never been reversed by anybody except Mr. Butler, and I will take Jefferson against my friend, the distinguished reporter of the Supreme Court on that subject.

This brings me right down to the precise point involved in

this discussion, and that is to the tenth article of the amendment, which reads as follows:

ARTICLE 10. The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Have we a right to violate the Constitution of the United States and incorporate in a treaty powers not delegated to the United States, powers that are not necessary and proper for carrying into execution the powers that are delegated, and barter away the privileges and rights reserved to the States respectively by virtue of the instrument and of the tenth amendment thereto that I have just referred to? The power of a State to regulate its public school system is clearly among its reserved powers. Have we, therefore, a right to provide in a treaty that the citizens of foreign lands shall possess privileges in the public schools of the States that are prohibited either by the constitution or by the laws of the State in which they are claimed? If we can, in defiance of the laws and constitution of a State, incorporate any such provision in a treaty so as to bind the State, then we can undoubtedly deprive the State of every reserved right that it possesses, and rescind and annul its laws and its constitution whenever they come in conflict with the treaty-making power. I trample upon this appalling doctrine. If ever such a deformity as this should creep into our judicial decisions, it would disfigure the Constitution to such an extent that its features would no longer be capable of recognition. It would annul the charter. It would frustrate the intention of the men who framed it. It would undermine the entire framework of the instrument, and it would convert us from a constitutional government into a dictatorship, with the States in abject servitude to Federal power, and with the Executive in practical control of the destinies of the Republic.

I want now to go over the cases. I know it is monotonous in the Senate to read cases, and I will not read them, because

I think I can recollect them. There are two lines of cases. The first line is made up of the three cases of *Ware v. Hylton* (3 Dallas), the case of *Chirac v. Chirac*, from my own State (2 Wheaton, 259), and a case in Virginia, *Fairfax v. Hunter* (7 Cranch, 603).

Ware v. Hylton is the great case that is quoted against the proposition that I am arguing here now. That case was argued by Marshall. It was the only case that Marshall ever argued to the Supreme Court of the United States. It was decided by Justices Chase, Patterson, Cushing, Wilson and Ireland, and the case covers 100 pages. Let me see if I can give it in a few words.

Virginia had confiscated the debts of all British creditors. After the Revolution, Congress made a treaty with Great Britain providing that British subjects should have the right to prosecute their claims in the courts of the United States without impediments. There was a conflict between the act of Virginia confiscating the debts of British subjects, and the treaty of the United States giving British subjects, without impediment, the right to sue. The United States courts held that the treaty prevailed and that the laws of the State of Virginia were in conflict with it and were void. I give you that case in a very short compass. I want to take the cases of *Fairfax v. Hunter* and *Chirac v. Chirac*.

I am coming now to the other cases in the first line. Maryland passed a law, and so did Virginia, that aliens could not hold property. The Government made a treaty with France that aliens could hold property in the United States. The laws of Virginia and Maryland came into conflict with the treaty, and the Supreme Court of the United States held that the treaty prevailed. Those are the two cases that are cited to sustain the proposition that Mr. Butler is contending for and against the proposition that I am advocating. I want to say one word about those cases. The treaty referred to in *Chirac*

v. Chirac and in *Ware v. Hylton* was made under the Articles of Confederation. It was not made under the Constitution at all. If you will look at the sixth article of the Constitution, you will see that it ratifies all treaties that have been made. This was one of the treaties that it ratified, because it was a treaty under the Articles of Confederation, and, furthermore, Justice Cushing, in uniting in the opinion of the court, says that Virginia was a party to the treaty, and being a party to the treaty she could not abrogate her own act, and she was estopped by having participated in it, and having been a party to it. We all recollect that under the Articles of Confederation it was necessary that nine States should assent to a treaty before it became effective.

Let me get to the second line of cases, which the Senators from the Pacific coast will recollect without my going into details. Both California and Oregon passed laws in reference to this question. California passed a law that no Chinese laborers should be employed by any corporation, and Oregon passed a law that Chinese laborers should not be employed upon the public works of that State. The question came up under the Chinese treaty—and the cases are reported in 5 and 6 Sawyer. Does the treaty prevail or does the law of California and the law of Oregon prevail? Is the law of California a valid law, which provides that no Chinese laborer shall be employed by any corporation in the State of California? Is the Oregon law a valid law, which provides that no Chinese laborer shall be employed upon any public works in Oregon? The Supreme Court said no. Why? Because, they held, the treaty having provided that Chinese, at that time should have the right to live here, that the right to live here carried with it the right to labor here; that a man can not live without earning a living; that if we had the right by treaty to give them the privilege of coming here, the treaty by intentment and construction carried with it their right to earn a liv-

ing; but the court never touched upon the reserved rights of the States.

Now, I want to take up the last case I am going to quote on the other side of this subject, because I want to argue it fairly. I come now to the decision in 92 United States, that most unfortunate decision of the Supreme Court of the United States. It does not trench at all upon the argument I am now making. California provided that no woman of ill repute should come into the ports of California. That is the Freeman case (92 U. S.). What did the Supreme Court decide there? As the Senator from Wisconsin knows, they did what they had never done before. They went back of that statute. They never construed the statute according to the language of the statute, but they held that California intended, by that provision of her law, to exclude Chinese women, although there was not a word said about Chinese women, or women of any other race. It was one of those peculiar cases in which the Supreme Court of the United States has gone into the motives of a State legislature in order to determine the validity of her statutes. But, Mr. President, when they came to decide that case they never touched upon the reserved rights of the State. If you will examine the Freeman case you will see that the Supreme Court held in that case that it was a regulation of commerce, and that California had passed a statute violating that article of the Constitution which gives the Congress of the United States the right to regulate commerce with foreign nations.

Before I give my cases, I wish to read one or two extracts from this author whom I have quoted here upon several occasions, to show how he contradicts himself upon this point, and how, when he is arguing against himself, he is finally forced to the conclusion that he has made a mistake, and that you can not make a treaty which interferes with the reserved rights of the State; and the only question in his mind is whether it is a reserved right of the State. If it is once settled that it is a

reserved right of the State, then it can not come within the treaty-making power, because you can no more violate Article 10 of the Constitution than you can violate any other Article of the Constitution in connection with its inhibitions and limitations.

Let me read a very peculiar passage from this author against himself. I am quoting now from a hostile authority to substantiate the propositions for which I am contending. I have the most eminent authorities in the country to sustain the propositions upon which I stand.

I read from page 31 of Butler on the Treaty-Making Power, a most interesting book. If it were not all wrong on this point, it would be the most valuable book upon the subject that we have in the United States. Upon page 31, Section 344, of this work, we find the statement which I shall read, made by my friend, Mr. Butler, whom I know personally very well, and of whom I think very highly. I do not intend that any criticism of mine upon his work shall in the slightest degree reflect upon his great industry and talent as a lawyer and as an author. He represents the same school that my friend the Senator from Indiana represents—the school that believes that we are a government of inherent sovereignty.

SEC. 344. *State statutes upheld; Chinese laundry cases.*—It must not be presumed, however, that the Federal courts have always interfered to prevent State action in regard to matters which are wholly under their control, and that they have used the treaty-making power as an excuse for interfering in their internal affairs. In 1885 the same learned justice of the Supreme Court who had declared the San Francisco queue ordinance invalid sustained a municipal ordinance of San Francisco imposing certain regulations and restrictions upon laundries, and which was undoubtedly aimed directly at the Chinese, as the queue ordinance had been. The Supreme Court held, however, that the regulation of laundries was a matter which came within the right of the municipality, and that treaty stipulations as to rights to live and labor should not be used to prevent the proper enforcement of municipal regulations.

Upon page 56 we find the following statement :

The Supreme Court has, in regard to treaties, as it has in regard to Federal statutes, ever kept in view the exclusive right of States to regulate their internal affairs.

Upon page 350, section 455, we find this remarkable statement from the same author, which seems to be in direct conflict with almost every other statement that he has made in this valuable work upon this subject :

SEC. 455. Power must be limited, as no unlimited powers exist.—

He has been arguing in 454 sections that unlimited powers exist, and when he comes to the four hundred and fifty-fifth section he says the powers must be limited, as no unlimited powers exist, and in order to apologize for the remarks he has made in the antecedent sections, he goes on to say :

After perusing the foregoing chapters, the reader may think he is justified in presuming that the author does not consider that there are any limitations whatever on the treaty-making power of the United States, either as to the extent to or subject-matter over which it may be exercised.

I should think we were justified in so presuming, when he has argued that question in the sections which have preceded this section.

Then says the author :

Such, however, is not the case. The fact that the United States is a constitutional government precludes the idea of any absolutely unlimited power existing.

He has never said that before. He continues :

The Supreme Court has declared that it must be admitted as to every power of society over its members that it is not absolute and unlimited ; and this rule applies to the exercise of the treaty-making power as it does to every other power vested in the Central Government. The question is not whether the power is limited or unlimited, but at what point do the limitations begin.

If the author had said that in the first section, it would have saved him the trouble of writing the greater part of his book.

Now, Mr. President, let me come to the citation of my cases, and I will finish them very briefly, although it is a subject very difficult to cover in the space I am devoting to it. I have the cases where this identical question has arisen—where the Supreme Court itself, and in approval of State authorities, has held not only that a reserved right of the State does not come within the treaty-making power, but has held that this right of a State to admit a particular class of people into its educational institutions is a reserved right of the State, and the Government has no control over it whatever, either in the treaty-making power or in statutes.

Let me read an extract from the case of *Geoffroy v. Riggs* (133 U. S., 267), as follows:

The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its departments, and those arising from the nature of the Government itself and of that of the States.

In 5 California, in the case of *The People v. Gerke*, the court, in its opinion, said:

The language which grants the power to make treaties contains no words of limitation; it does not follow that the power is unlimited. It must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the Federal Government would be ineffectual, and the reserved rights of the States would be subverted. This principle of construction, as applied, not only in reference to the Constitution of the United States, but particularly in the relation of all the rest of it to the treaty-making grant, was recognized both by Mr. Jefferson and John Adams, the two leaders of opposite schools of construction.

I now refer to the case of *The People v. Gallagher*, in 93 New York Reports, page 438, and to the case of *Roberts v. The City of Boston*, 5 Cushing, 198, both of which cases have been cited

with approval by the Supreme Court of the United States, and in which the question whether a separation of the races in the public schools was a violation of the "privileges and immunities" guaranteed by the Constitution, came before the courts. I quote from the first case:

The school authorities have power, when, in their opinion, the interests of education will be promoted thereby, to establish schools for the exclusive use of colored children; and when such schools are established and provided with equal facilities for education, they may exclude colored children from the schools provided for the whites.

The establishment of such separate schools for the exclusive use of the different races is not an abridgement of the "privileges or immunities" preserved by the fourteenth amendment of the Federal Constitution, nor is such a separation a denial of the equal protection of the laws given to every citizen by said amendment.

It seems that the "privileges and immunities" which are protected by said amendment are those only which belong to the citizen as a citizen of the United States—

I beg, my friends, to draw the distinction here between a citizen of the United States and a citizen of a State, because a man may be a citizen of the United States without being a citizen of any State.

those which are granted by a State to its citizens and which depend solely upon State laws for their origin and support are not within the constitutional inhibition and may lawfully be denied to any class or race by the State at its will and discretion.

It seems also that as the privilege of receiving an education at the expense of the State is created and conferred only by State laws, it may be granted or refused to any individual or class at the pleasure of the State.

Can the United States, by treaty, go beyond the delegated powers of the Constitution? Admitting that it can not violate the Constitution, is the treaty-making function circumscribed by the Constitution? The first case that arose was a California case, which was quoted by the Supreme Court with approval. It was the people, ex rel. the Attorney-General, *v.* Nagle. I read from 1 California, 232.

The State of California, as the Senator from California will remember, had imposed a license upon foreigners engaged in working gold mines in that State, and the question arose whether California, under the treaty, had a right to pass such a law. The Court said:

But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must therefore stand and the State law give way. The question in such case would not be solely what is provided for by the treaty, but whether the State retained the power to enact the contested law or had given up that power to the General Government. If the State retains the power, then the President and Senate can not take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department and in relation to those subjects the jurisdiction over which has been exclusively intrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it can not supersede a State law which enforces or exercises any power of the State not granted away by the Constitution. To hold any other doctrine than this would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective States, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the States to a foreign nation.

In addition to this case, I want to refer to the important cases in 119 Federal Reporter, page 381, and in 5 Howard, page 613, to the opinion of Justice Daniel, which is concurrent upon the proposition from which I quote, and which reads as follows:

This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the Federal Government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the General Government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to

be valid, must be made within the scope of the same powers, for there can be no "authority of the United States," save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State.

I wish to refer now to a case in 118 Federal Reporter. This was a case where a Chinese girl filed a petition for a mandamus against the public school trustees of San Francisco, I think, asking admission into the white school. It was denied. The case went to the United States Court, and the court said that she had no right to be admitted into the white public schools of California; that there were schools set apart for her, and she could go into those schools. Is it not a strange thing that California can pass a law providing that the Chinese children who live there shall be separated in the schools, and can not pass a law that the Chinese children who do not live there, those who shall come there hereafter shall not be separated, but that they must be put in the white schools?

The Senate will sustain me in the proposition, without quoting the cases, that the court has absolutely decided that children of Chinese parents have no right to go into the same schools with white children in California; and that has been approved of by the Supreme Court of the United States. How is it possible to hold that the Chinese children who live there can be separated and segregated, but that children living in China or Japan who may come here can not be separated and segregated, but must go into the white schools?

Let me get back again now to what Jefferson said—it is just three lines. He said it long ago, but not too long ago to be forgotten, and this is the proposition on which Mr. Butler says Mr. Jefferson has been reversed:

By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty and can not be otherwise regulated. It must have meant to except out of these the rights reserved to the States, for surely the

President and Senate can not do by treaty what the whole Government is interdicted from doing in any way.

That is a concise but a stately statement of the proposition upon which I have planted myself today.

The last case I shall cite is the case known as the "Dispensary case," decided by Judge Simonton in the South Carolina circuit (54 Fed. Rep., 969). It is so pertinent to the subject-matter of this discussion that I shall quote an extract from the opinion of Judge Simonton thereon:

It is urged on behalf of these complainants that they are Italian subjects, and are protected by the treaty stipulations between Italy and the United States. The language of the treaty on this point is as follows:

"ART. 2. The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other; to carry on trade, wholesale and retail; to hire and occupy houses and warehouses; to employ agents of their choice, and generally to do anything incident to or necessary for trade upon the same terms as the natives of the country, submitting themselves to the laws there established.

"ART. 3. The citizens of each of the high contracting parties shall receive in the States and Territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

Under these articles the complainants have the same rights as citizens of the United States. It would be absurd to say that they had greater rights. We have seen that the right to sell intoxicating liquors is not a right inherent in a citizen, and is not one of the privileges of American citizenship; that it is not within the protection of the Fourteenth Amendment; that it is within the police power. The police power is a right reserved by the States, and has not been delegated to the General Government. In its lawful exercise the States are absolutely sovereign. Such exercise can not be affected by any treaty stipulations.

In addition to the cases that I have cited, and in closing the entire reference, I desire to now advert to several diplomatic precedents of great value upon this subject. The first incident

took place during the administration of Mr. Marcy over the Department of State, and I quote his opinion in the matter :

[Mr. Marcy, Secretary of State, to Mr. Mason, Minister to France,
September 11, 1854.]

It is not, as you will perceive by examining Mr. Drouyn de L'Huys's dispatch to the Count de Sartiges, the application of the "principle" to the particular case of M. Dillon which is to be disavowed, but the broad and general proposition that the Constitution is paramount in authority to any treaty or convention made by this Government. This principle, the President directs me to say, he can not disavow, nor would it be candid in him to withhold an expression of his belief that if a case should arise presenting a direct conflict between the Constitution of the United States and a treaty made by authority thereof, and be brought before our highest tribunal for adjudication, the court would act upon the principle that the Constitution was the paramount law.

The second incident also took place during the administration of Mr. Marcy :

[Mr. Marcy, Secretary of State, to Mr. de Flanliere, Portuguese Chargé d'Affaires, March 27, 1855.]

Although the language of Article II of the Consular Convention between the United States and France of February 23, 1853, exempting consuls from compulsory processes, is general and unrestricted in terms, "yet it is here held that it does not take away the right which the defendant in a criminal prosecution has to resort to such process to procure the witnesses in his favor, for this right is secured to him by the express language of the United States Constitution." That instrument is paramount in authority to the laws of Congress or of any of the States, and to all treaty stipulations.

At a very late date the question arose with the Department of State, presided over by Secretary Hay, and I read the conclusion that the Secretary reached upon this subject, quoting from Mr. Moore's valuable treatise upon international law :

July 19, 1890, the Department of State declined a proposal of the British Government to negotiate a treaty to prevent discriminatory legislation by the several States of the United States, subjecting foreign fire insurance companies to higher taxes than domestic companies. The reason given for the declination was that the negotiation of such a treaty would probably be futile on account of the indisposition of the people to permit any encroachment upon the exercise of powers of the local legislation.

Is it necessary for me to say anything further? Are the public schools of California the property of California, or the property of the United States? Does the public school system of California or of any other State belong to the State that creates and supports it, or to the Government that has neither created nor sustained it? Does this subject come within the treaty-making power? Does it come within the delegated powers of the Constitution? Have the United States the right to incorporate into a treaty a provision that the States shall, out of their own treasury, educate the citizens of foreign governments? Is there any power in any treaty to deprive any of the States of their reserved right to regulate and manage their local affairs according to their own usages and statutes?

Are not foreign governments that deal with us presumed to know the nature and the character of our institutions, and is not this principle fully established by an unbroken line of precedents passed upon by the State Department from time immemorial? There can be but one response to all these inquiries, in my opinion, and as the result of the investigation that I have given to this subject I now assert, in the language of the resolutions, that the public school systems of the States belong to the States along with all their reserved rights; that the Government has no power whatever to meddle with them or control them, and it was the duty of the President to have informed the Government of Japan as soon as the question arose, no matter what his feelings or sentiments may have been, that the subject was entirely without the domain of his jurisdiction.

I shall now, in conclusion, summarize the results that I have reached. I am not here for the purpose of denying to the Government the power to cover by treaty every right, privilege and concession that comes within the treaty-making power in order to carry out the objects and purposes of this Government as defined in the Constitution. I do not for a moment set up the reserved rights of the States against the exercise of any con-

stitutional power that may be incorporated in a treaty. I admit that the United States can enter into any treaty with any foreign power in reference to any subject embraced in the Constitution. I deny, however, that it possesses any inherent right to make a treaty, and I claim that the treaty-making power lies in grant and not in sovereignty, and must be construed *in pari materia* with all the other clauses of the instrument that creates it, and that in interpreting the treaty-making power we must be governed by the principles of international law, its usages and its practices, as those principles, usages and practices appertain to our form of constitutional government. I utterly deny that we have any right to make a treaty that violates the Constitution, or deprives the States of their reserved rights to conduct their local affairs over which the Federal Government has no jurisdiction, and which they alone have the right to administer according to their own constitution and statutes.

As I said at the commencement, this is a grave and profound question that we have encountered. The local problem sinks into insignificance beside the great principle that is here involved. It affords a timely warning and admonition that at any time, through the treaty-making power, a deadly blow may be aimed at the entire fabric of our institutions, and they can be leveled to the ground. If the President can practically make a treaty, and that is what he is doing in other directions, and dispose of the reserved rights of the States, then the treaty-making power is above and beyond the Constitution, and the supremacy of the States within their own borders departs and vanishes forever. If the Democratic party accepts such a doctrine as this, then it has also parted with its birthright and abandoned the historic ground upon which it has stood for over a century. I believe in the complete exercise by the Federal Government of every Federal power contained in the Constitution, but beyond the delegated powers and the right to pass all

laws necessary to execute the delegated powers, I would never justify the slightest encroachment upon the reserved rights of sovereign States within their own borders. In the night of our despair, this reserved right of the States is the only constellation that for our party has no "fellow in the firmament." We were born under its horoscope, and if there is any life left in us we must forsake the worship of grotesque and meaningless idols and follow it like a pillar of fire to the land of our nativity.

EXECUTIVE FUNCTIONS AND STATES' RIGHTS.

This speech, delivered on January 31, 1907, supported Senator Rayner's resolution holding that the prerogatives of the Executive should be limited to the performance of duties assigned him by the Constitution and the laws of Congress.

Some weeks ago, a member of the Cabinet, a lawyer of great attainments and profound learning, in an address delivered by him, and given wide circulation in the public press, gave utterance to the following sentiment:

It is useless for the advocates of States' rights to inveigh against the supremacy of the constitutional laws of the United States or against the extension of national authority in the fields of necessary control where the States themselves fail in the performance of their duty. The instinct for self-government among the people of the United States is too strong to permit them long to respect anyone's right to exercise a power which he fails to exercise. The governmental control which they deem just and necessary they will have. It may be that such control would better be exercised in particular instances by the governments of the States, but the people will have the control they need, either from the States or from the National Government, and if the States fail to furnish it in due measure, sooner or later constructions of the Constitution will be found to vest the power where it will be exercised in the National Government.

About a week after this address had been delivered and sufficient time for further reflection had elapsed, the distinguished Secretary of State, in answer to comments and criticisms that

had been passed upon his remarks, publicly announced that he had no intention of changing a word or an idea that he had expressed upon this occasion.

Speaking now with the utmost deference and respect, and with great admiration for the services that he has rendered in the various public positions which he has occupied and that he has so highly honored, I regard this doctrine thus announced, adhered to, and emphasized, as a most dangerous and insidious attack upon the institutions of the country. I would not attach so much practical importance to the address, if it were not for the fact that the propositions advanced are being constantly illustrated in the administration of our Government, and, therefore, they can not be regarded simply as the expression of a sentiment or a theory, but must be taken as they were intended to be taken, as manifesting the purpose of the present Administration to carry this new doctrine of constitutional construction into execution whenever the opportunity or emergency may arise for its exercise.

Let us, therefore, analyze it and be prepared to meet it as a substantive issue which, for the novelty of its conception and the unmasked boldness of its pretensions, is without a precedent, and I hope, without a following among men of either party who have any desire whatsoever to maintain the autonomy of the States or the inviolable character of our Federal institutions. The sum and substance of this revolutionary idea is this: There are certain powers which the Federal Government can not exercise and which, nevertheless, may be considered necessary for the welfare of the Union. The States, either separately or by concurrent action, could come to the rescue of the Constitution and enact legislation that would afford full and adequate relief for the want of power in the Federal Government, repeating now the identical language that was used—"the people will have the control they need, either from the States or from the National Government, and if the

States fail to furnish it in due measure, sooner or later constructions of the Constitution will be found to vest the power where it will be exercised in the National Government." That is to say, that this Government is a government of delegated and enumerated powers, and beyond these powers entire and absolute sovereignty rests with the States. The delegated powers are not sufficient to cover the field of national necessity. The States must not permit their powers to lie dormant. They must supply the deficiency, and, if they fail to do this, then the legislative, executive and judicial branches of the Government will supplement the Constitution and so construe and adapt the delegated powers that they will carry with them the dormant powers of the States that they have failed to put into practical operation.

If such a doctrine as this had obtained in the Constitutional Convention, the Constitution would never have been ratified, and we would never have had a Constitution of the United States. And if either Congress, or the President, or the Supreme Court is to undertake this construction now and assume this unlawful prerogative, then it would become absolutely necessary for us to resolve ourselves into a government of inherent power, with unlimited jurisdiction, and with the reserved rights of the States obliterated and extinguished.

I shall not enter into an academic discussion upon the reserved rights of the States and the imperishable distinction between these rights and the delegated powers of the Constitution. An incessant flood of political literature—volumes upon volumes, adjudications ranging over a century—and the common consent of the American people have settled the question, and we dare not do what is foreshadowed in this address without subverting the foundation upon which this Republic stands. It would be a perfect waste of time for me to roam over the field of judicial history and present to any intelligent assemblage the cardinal distinctions of the Constitu-

tion between delegated and reserved powers. The monotony of such an argument would warn me to desist from pursuing it, and its universal acceptance, covered and closed forever by the decisions of the Supreme Court, admonishes me that the Senate of the United States desires no presentation upon that subject. What we now want is to meet the menace and the threat that the States shall gradually lose their reserved rights, not because they do not exist, but because such a construction shall be placed upon the enumerated powers of the Federal Government that the local laws and customs and usages of the States—that their constitutions and their statutes; that the will of their people as expressed in their conventions and legislative assemblages; that their dormant and unexercised powers; that their failure to provide for the welfare of other States and for the general welfare of the Union—must all give way to this new rule of interpretation and construction. This declares that whenever there is a proposition that, in the opinion of the ruling powers, tends to promote the general welfare of the Union, the actual Federal powers shall be enlarged and strained to such an extent that this Government shall no longer be a government of delegated powers, but shall resolve itself into a centralized despotism without any limitation upon its activities, without any inhibition upon its authority, and without any boundary to its jurisdiction.

Let it not be supposed for a moment that I am opposed to the most complete execution of all Federal powers vested in the Government under the Constitution. I believe, whenever the emergency arises, in the exhaustion of Federal power for the purpose of meeting it, and the Supreme Court of the United States has never hesitated to ratify the doctrine first proclaimed by Marshall in *McCulloch v. Maryland*:

Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end; which are not prohibited, but consist with the spirit and letter of the Constitution, are constitutional.

When we come to collect taxes, to regulate commerce, to coin money, to restrain the carriers of commerce from extortion and discrimination, to prevent unlawful combinations of centralized wealth from plundering the people, and to exercise every power vested in this Government, I say, as the Supreme Court in unnumbered decisions has declared, that these powers must keep pace with the development of the country. As it progresses and advances, the subject upon which these powers can operate expands and enlarges so that today admittedly the field of their operations has passed beyond contemporaneous construction, and covers a territory and a multiplicity of cases that were not and could not have been within the contemplation of the men who framed the Constitution. Every thought that the Secretary has uttered upon this branch of the subjects meets with my ready consent, and I proceed with him to the utmost limits of his contention. This is not the point at all upon which we divide. We divide upon the point that you can interpolate into the Constitution new powers upon the plea of governmental necessity. I may admit that a uniform divorce law, referred to by the Secretary, would be highly beneficial to society, but I deny that there is any possible method by which we can work it into the Constitution. And when he refers to a uniform insurance law I may admit that such a plan would be entitled to our serious consideration, but I respectfully challenge him to point me to the clause in the instrument that can be construed to cover such a grant.

Let me ask in this connection what about the law that would embrace the right of suffrage? There is the practical danger that confronts us. There is an illustration that comes right within this new canon of construction. Each State has its own statutes regulating the suffrages of its citizens, and without infringing upon the amendments, a number of them have provided for an educational test and property qualifications. In this regard a State is not controlled by what other States

may require, nor does the welfare of the Union at all enter into its consideration. It is entirely a question of its own welfare and its own environments, and its own safety and its own moral and material progress. I do not for a moment contend that the Secretary would deprive the States of this right, but under his new plan of constitutional construction it would be a simple process to accomplish this result. Does it make any difference that in the case of *Miner v. Happersett*, in 21 Wallace, the Supreme Court has declared that the Constitution of the United States does not confer the right of suffrage upon anyone, and that in a subsequent case, that of *The United States v. Cruikshank*, in 92 U. S., the Supreme Court, affirming the earlier case, has again declared that the right to vote in the States comes from the States, and that only the right of exemption from the prohibitive discrimination comes from the United States. The House of Representatives today, adopting this new rule of constitutional construction, can practically repeal these decisions and decline to admit any member into its body from any Southern State that limits its suffrages to the intelligence of its citizens, upon the plea of governmental, or, to be more accurate, of party necessity. Thus, one by one, the reserved rights of the States would fall and away would go the decisions of a century.

In *Texas v. White*, in 7 Wallace, the Chief Justice declared that the "maintenance of the government of the States is as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

In *Ex parte Milligan*, 4 Wallace, the Supreme Court rang this clarion note:

The Constitution never yields to treaty or enactment; it neither changes with time, nor does it in theory bend to the force of circumstances; its principles can not be set aside to meet the supposed necessities of great crises; no doctrine involving more pernicious conse-

quences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of the Government.

All our judicial history rings with one accord upon this theme from the time that Madison declared that the jurisdiction of this Government extends to certain enumerated objects, and leaves to the several States a residuary and inviolable sovereignty over all other objects, and Hamilton declared that all authority of which the States are not explicitly divested in favor of the Union, remains with them down to the day when the Supreme Court proclaims that the Constitution, in all of its provisions, looks into an indestructible union composed of indestructible States.

This new dispensation, therefore, is at utter war with judicial opinion. It makes a mockery of the unbroken line of adjudications upon the subject. It turns the Constitution into a rhapsody of words. And, if the heresy is ever to be accepted by the coming generations, we might as well apply the flames to that great edifice of constitutional thought that it has taken over a century to erect, and level it, in all the symmetry of its proportions, to the earth.

As I said at the beginning, Mr. President, I would not have arisen here today at all if it were not for the fact that this doctrine of constitutional perversion is being put into practical operation constantly by those for whom the Secretary is speaking, and whose purpose and design he is so clearly upholding and fortifying, and this brings me to the other branch of the resolution.

I would like it understood that I do not intend in anything I may now say to assail the President of the United States. It is my determined purpose not to do so, and I shall extremely regret it if I deviate therefrom. I esteem him too highly in a great many respects, individually and officially, to be influenced in the slightest degree by personal motives, and I propose to

treat him with the courtesy and dignity that my position calls for, and that his station entitles him to. Those who know me best, know that I am not a partisan in politics, and even if the occasion were present, and fully justified it, I should not make use of this place for the purpose of creating political capital or fomenting party rancor out of any of the facts with which I am about to deal.

I have a great object in view, which must not become involved with any element of political bias that would tend to lower the aspect in which I propose to present it. I am looking to the future and not so much to the present. No journal in the land, if it should honor me by taking any notice of what I am about to say, will charge me, I hope, in my analysis of the President's official methods, in indulging in any criticism that may be objectionable either to him or to that great body of the American people who confide in him and admire him for what he has accomplished for his country. Thus restrained and circumscribed, I shall now proceed to illustrate the proposition that the President of the United States, influenced by honest motives, nevertheless, sets an example for future Presidents and future generations that is destructive of our best traditions, that challenges the law, that ignores the limitations of the Constitution, and which, if followed under impulses less sincere and patriotic than his own, would ultimately result in an entire misconception of our form of government upon the part of those who may be called upon to administer it, and would effect a gradual upheaval of the principles that underlie and form the bulwark of our institutions.

The imperishable distinction of executive, legislative, and judicial functions is the basic principle that supports the organic law of this land. If there has been any confusion upon this subject, it ought to be cleared up. If there is a growing misapprehension among the people in regard to the power of the Executive, it ought to be arrested before it makes any fur-

ther inroads upon their credulity. If there has been any violation of the plain intent and meaning of constitutional requirements it ought to be exposed. And if the people, as has been claimed, are utterly indifferent as to the methods employed, whether unconstitutional or not, provided the accomplishment inures to the advantage of the country, then they ought to be aroused from their lethargy and confronted with the traditions of the Republic and the genius of our institutions.

The proposition under consideration goes far beyond the President, personally, because it relates to our entire conception of executive duty and of governmental distinctions. And my sole object now in entering upon this investigation, is to prevent the present interpretation of Executive authority, as far as it lies within my humble power, from becoming without further question or examination a part of the accepted policy of the country. The President is laboring under the honest impression that he is responsible to the country for the legislation of Congress, and that, therefore, it is his duty to interfere when its proceedings do not comport with his own ideas as to what is best for the interests of the people. In accordance with this rule he has ignored not the letter, because that can not be done, but the substance and spirit of the plan of a diversion of governmental functions as embodied in the Constitution. Of course, with an Executive who did not have the welfare of the people at heart, such an illusion would be fatal to the stability of the Republic. In pursuance of this purpose we have now, for the first time in our history, a Government practically conducted in nearly all of its departments, with the exception of the judiciary—and even there the encroachment is visible—by the Executive, in conformity with his own ideals and standards. His standards and ideals may be right, and I am satisfied that they are in a number of instances, but, I believe, with all the sincerity I possess, that the safety and welfare of the Republic is in danger if the blight of such a policy should

be allowed by any insidious process to become engrafted upon our institutions.

I shall now take as the first instance where there has been a conflict between executive and legislative functions—the treaty-making power of the President and the Senate. Article second of the Constitution provides that the President shall have power by and with the advice and consent of the Senate to make treaties, provided that two-thirds of the Senators present concur. In the Santo Domingo affair the President has evidently made his own treaty. I am not discussing the proposition whether his views and purposes are right or wrong in reference to Santo Domingo. He may be right; a great many persons think that he is. He may have performed a great public service for the people of that island and for civilization and humanity in the efforts that he has made to extricate them from their difficulties and misfortunes. This is not the point at issue. The charge that I make, is that he has accomplished this in violation of the Constitution, and has set an example for his successors which, if followed, would abrogate the provision that gives this body the right to be consulted in the treaty-making power.

The principle provision of the Santo Domingo treaty relates to the collection of the revenues of the island and their distribution among its creditors. All other parts of the treaty were subordinate to this. What has been done? The treaty has been practically carried into effect without consulting the Senate. The appointment of an American agent as an official of Santo Domingo to collect its customs was simply a cover and an evasion. Under the principles of international law and the comity of nations, this Government is morally bound for the proper custody of this fund, and would be liable in case of its waste or loss. After its collection, the only act of any consequence that remained to be done was its distribution, and even

this has been practically determined upon, I understand, by settlement with her creditors.

Now, when you add to this the fact that our warships are in the harbors of the island ostensibly for the purpose of protecting American interests, but in reality protecting the officials of the island against any menace from without, and revolution from within, you have the establishment of a sovereignty or a protectorate without a word from Congress or the Senate sanctioning the same. This is called a *modus vivendi*, but the phrase *modus vivendi* has no application to a condition of this sort, and is a perfectly meaningless absurdity in this connection. What is being done is the maintenance of a *status quo*, but a *status quo* created by the President at the time of the negotiation of the treaty, and without any warrant of law whatsoever. I do not believe that in all the archives of the State Department there can be found any precedent for such a proceeding. Any President could at any time, following this example, make an agreement with any foreign country, uphold it by armed intervention, and then, if the Senate declined to confirm his action, simply announce that he proposed to maintain the *status quo* or *modus vivendi*, as it is erroneously called, and thus practically effectuate a treaty, whether the Senate consents or not. What the President has done in reference to Santo Domingo, he can duplicate any day with respect to any of the bankrupt and revolutionary republics of Central or South America. They may appeal to him for help. He may negotiate a treaty and the Senate may decline to act upon the treaty, and in the meantime he may enter into an agreement with them to collect their customs duties, place them on deposit in an American bank, in the custody of an American representative, and when Congress or the Senate calls him to account he can, with absolute defiance, announce that the work has been done and that it is the duty of this Government to make a proper division of the funds.

When an appeal comes to him from this quarter he can direct our warships to protect American interests, and to incidentally protect the party in power or the revolutionists friendly to our intervention. He can assume control over their custom-houses and maintain a financial protectorate over them without a treaty and without constitutional or legislative sanction. This policy may be all right; perhaps the American people are in favor of this new doctrine. It may be a wonderful accomplishment; Central America may profit by it. It may be a great benefit to us commercially and it may be in the interest of civilization, but as a student and follower of the Constitution, I deprecate the methods that have been adopted. I appeal to you to know whether we propose to sit silently by and, by our indifference or tacit acquiescence, submit to a scheme that ignores the privileges of this body; that is not authorized by statute; that does not array itself within any of the functions of the Executive; that vests the treaty-making power exclusively in the President, to whom it does not belong; that overrides the organic law of the land, and that virtually proclaims to the country, that while the other branches of the Government are controlled by the Constitution, the Executive is above and beyond it, and, whenever his own views or policies conflict with it he will find some way to effectuate his purposes uncontrolled by its limitations.

Mr. President, I think that the Judiciary ought to be entirely free from executive interference. Every person of intelligence must agree with me upon this proposition. The Executive should never, either by approval or criticism, constitute himself a reviewing power over the decisions of the courts. It is, therefore, my judgment that the criticism by the President of Judge Humphrey with reference to his decision in the case known as the Meat Packers' Case, in the Illinois circuit, was uncalled for and an invasion of his judicial prerogatives. I am inclined to think that the decision was correct and would have

been sustained upon appeal if an appeal could have been taken; but, right or wrong, it did not come within the functions of the President to reprove the judge or animadvert upon his opinion.

We can not tolerate such intrusion upon the rights of the courts. The courts are not responsible to any President of the United States for their judgments. The exercise of judicial power is just as distinct from the exercise of executive power as is the exercise of legislative power, and the Presidents of the future should be told once and forever that when they enter upon this field they are treading on forbidden ground. I can imagine no condition more intolerable than a system under which the judiciary would feel that their judgments and sentences must conform to the wishes of the Executive, and if they are objectionable to him, that they are subject to his censure and reproof. It was this system that for a time brought shame and dishonor upon the administration of the common law, that permitted the guilty to escape and the innocent to suffer, and filled the courts with cruel, servile judges, and made the arm of justice the adjunct of the Crown, fortifying the abuses of the tyrant and suppressing the liberty of the subject. A judge would have been perfectly justified if he had declined to submit in silence to the rebuke of the Executive. He could well, with calm and dignified defiance, have proclaimed from the bench: I am a sovereign here and you have no greater right to interfere with me than I have extrajudicially to denounce an act of yours as usurpation.

This is the abode of justice. Its ground is sacred, and its altar is inviolable. It is like an Anglo-Saxon home, *Domus sua cuique tutissimum refugium*, in which the poorest man, though his be the humblest hut or the lowliest hovel, "may challenge all the forces of the Crown to enter. It may be frail. Its roof may shake. The storm may enter, but the King of England can not enter. All his forces dare not cross the threshold of the ruined tenement."

There is another act that the Executive should never undertake, and that is to intrude his presence upon the States in the exercise of their sovereign functions. I send now to the desk of the Secretary to be read, the report of an incident which the country seemed to treat with entire indifference, but which at the time it occurred surprised and startled me beyond expression.

Boston, June 11.

Governor Guild made public today a telegram received by him from President Roosevelt, in which the President, after pointing out that he had been requested to interfere with the execution of Charles L. Tucker, declares that, in his judgment, Governor Guild's decision not to interfere with the carrying out of the sentence on Tucker seemed to him entirely sound and commanded his hearty sympathy.

Tucker is under sentence of death this week, probably tonight, for the murder of Mabel Page at Weston, on March 31, 1904. President Roosevelt's telegram follows:

THE WHITE HOUSE,

Washington, June 10.

GOVERNOR CURTIS GUILD, Boston, Mass.:

Have been requested on behalf of certain parties in Boston to interfere with the execution of Tucker, it being alleged that it is my duty so to do inasmuch as I have the power under the Federal laws.

No showing has been made to me that I have such power, but, without regard to this, I desire to state to you that, in my judgment, your decision not to interfere with the carrying out of the sentence of Tucker seems to me entirely sound and commands my hearty sympathy. It seems particularly a case in which there should be no interference with the carrying out of the sentence.

THEODORE ROOSEVELT.

I never knew a communication of this sort to be sent by a President to the Governor of a State since the foundation of the Republic, and, for the President's sake and in his interest, I deeply regret and deplore the occurrence. What does this mean, and what are we coming to? Certain citizens of Massachusetts had petitioned the President to come to the rescue of a prisoner who had been convicted of a capital crime in the State

of Massachusetts, and upon whom sentence was about to be executed. I know nothing of the guilt or innocence of the person. He may have been guilty, or he may have been innocent. If innocent, he is not the first man who has been deprived of his liberty or his life under the laws of the land. What was the President's plan and unmistakable duty in the premises? I am willing to admit that the President in his individual capacity had a perfect right to examine the case, and if he believed that an innocent man had been sentenced to death it would have been his duty and his privilege, not as President, but just as it would have been the duty and privilege of any person to interest himself in his behalf. I have never known the day when I would not have been willing, if I thought the man had been unjustly convicted, to use every effort to obtain justice for him. I believe there is a law of God and humanity higher and more imperative than the law of the State.

But what did the President do in this case? In an official or quasi official document, headed at the White House, he indites a letter to Governor Guild, of Massachusetts, who had not written to him at all, in which he intervenes in the proceedings, sympathizes with the Governor heartily in carrying out the sentence, and decides that it is a case in which there should be no interference by the Governor, giving practically the official sanction of the President of the United States to the act of the Governor of Massachusetts in declining to interfere with the judgment of the court.

It would have been in extremely good taste for Governor Guild to have respectfully remitted this telegram to the President, with the caution that he did not request the President's opinion in the case, nor the sanction of his high station, to the carrying out of the execution. Now, I am not speaking as a party man, and surely, as I have said, I am not actuated by any feeling of hostility toward the President, because there is no one, even upon the Republican side of this chamber, who is

willing to give him greater credit for the accomplishments he has wrought for the people of this country than I am. I shall turn now to members of the Republican party upon this floor and ask them, in all candor, whether this was not a grave error upon the part of the President. I ask them, if any of them occupied the place the President does, would they, solicited or unsolicited, have sent a communication of this sort to the Governor of any State in this Union? I will go further than this and appeal to the President himself to reflect upon this incident and give it his serious consideration, and then determine whether, as a student of our institutions, he would not deprecate and condemn an act of this sort upon the part of any one whatever connected with any department of the Federal administration.

Of course, I will admit that there was no technical violation of any provision of the Constitution, but I appeal now not to ignorance, not to drones and idlers slumbering in apathy and indifference, but to the thought and manhood of my countrymen, irrespective of parties, to know whether we can afford to establish a precedent like this or permit it to go unnoticed. In my judgment, it involves a most serious proposition. It practically announces that the acts of State officials are subject to the approval or displeasure of the Federal Government. It obliterates the line between the two. It announces to the Governor of every State that if he is in doubt about the performance of some act confided to his supreme authority, he can appeal to the President for guidance. It makes the President the arbiter and umpire in controversies beyond the utmost pale of his jurisdiction. It invests the minds of the rising generation who are studying the framework of our institutions and analyzing their delicate combination with an erroneous idea as to their scope and character. It extends the President's influence into spheres of action entirely beyond the province of his allotted and delegated functions. It makes a gaping wound in the heart

of the Constitution, and, if extended to its logical limit, dispels the doctrine of reserved rights and enumerated powers and makes the functionaries of sovereign States the agents and deputies of Executive dictation.

We come now to another and a different scene. The pivotal point around which the railroad rate bill revolved for months in this Chamber was the character of review that the courts were to assume under its provisions. One side claimed that the courts should only exercise a constitutional review under the Fifth amendment. The other side advocated a full statutory review from the proceedings of the Interstate Commerce Commission.

The President came into the game early. We realize that no fight is thoroughly equipped upon this floor unless the President is in it. He longs for a fight as the hart panteth after the water brooks. It was a match to the finish between the senior Senator from Rhode Island and the President. They stood respectively in the foremost ranks of their profession. The Senator from Rhode Island was an expert in the ring and had upon many occasions in this arena been awarded the victor's prize. The President, also, was a dean in the art, and had reached a degree of eminence in his calling that made him a dangerous foe to encounter. It was a most interesting spectacle. The Senator from Rhode Island time and time again went down beneath the ponderous blows of his opponent, but each time he arose like Aurora, the goddess of the dawn, from her chariot in the sea. At length science commenced to tell. The Senator from Rhode Island had reserved his strength for the last encounter. The President had changed his tactics so often that he became exhausted and appealed for help. One morning the Senator from Rhode Island appeared in this Chamber with a radiant smile. The President had never penetrated the meaning of that smile. It had lured him like the sirens lure their victims to destruction. The smile indicated

that the tournament was over. The Senator from South Carolina looked upon the other side of the Chamber for his promised troops, but they had fled and vanished. An ex-Senator from New Hampshire lay dead upon the field. The President lay entangled in his armor, and his breastplate and his battle-ax were shattered, and above him waved the pennant of Rhode Island, and the Senator from Rhode Island smiled. If the President had only kept out of this fray it would have assumed an entirely different form and ended in an entirely different way. It was impossible, however, for him to do this. He could not remain quiescent in the White House and observe a great struggle like this progressing without taking part in it. So long as he got into it, it really did not make much difference to him upon which side he was enlisted. One day he was upon one side and the next day he was upon the other.

Here we were day after day struggling with questions of constitutional law, laboring under the vain delusion that we had the right to legislate; that we were an independent branch of the Government; that we were one department, and the executive another, each with its separate and well-defined distinctions. We imagined these things, and, while following a vision and a mirage, the President was at work dominating the legislative will, interposing his offices into the law-making power, assuming legislative rights to a greater extent than he could possibly do if he were sitting here as a member of this body; dismembering the Constitution, and exercising precisely and identically the same power and control as if the Constitution had declared that Congress shall pass no law without the consent of the President. He was adopting a system that practically blends and unites legislative and executive functions, a system that prevailed in many of the ancient governments that have forever gone to ruin, and which today still obtains in other governments, the rebellious protests of whose subjects are echoing

over the earth and whose tottering fabrics I hope are on the rapid road to dissolution.

If I were called upon to select the most wonderful exhibition of the President's power that has occurred within my experience, I would take our action upon the canal bill at the close of the last session of Congress. This was an achievement in which his consummate skill in propelling legislation appeared in its most perfect proportions. We had all heard the argument of the junior Senator from South Dakota in favor of a sea-level canal, and its demonstrative facts and unanswerable logic seemed to carry conviction with its presentation.

All at once a wireless message came from the White House. The President had determined that there was either to be a lock canal or that there should be no legislation upon the subject. I can never forget the day upon which the vote was taken. The biography of the President will perhaps some day be written by the senior Senator from Massachusetts. McCauley said that if Boswell had not been the greatest fool who ever lived, he could not have given to the world the greatest biography that was ever written. This will not apply to the Senator from Massachusetts. He wields a master's hand in biographical literature, and when he writes this biography I hope he will dwell with glowing emphasis upon this surpassing accomplishment. Napoleon at Austerlitz never turned the scales of fortune with greater celerity of movement or audacity of assault than the President threw into this maneuver. How was it done? What subtle force did he employ in the execution of his plan? The day the vote was taken, this Chamber presented a most peculiar aspect. The air seemed laden with some narcotic, wafting its somniferous essence over this body. When the roll was called the clerk could hardly hear the responses upon the side of the lock canal, and as the answers came they came in whispered accents and with bated breath. The charm had done its work, the deadly vapor had benumbed our facul-

ties and made us pliant slaves to the master will. Even the senior Senator from Ohio who, when his convictions are aroused, has often on this floor displayed the Nemean lion's nerve, fell a victim to the magic power of the love charm that had been concocted at the laboratory of the White House. I would like the Secretary to read a few of the pathetic and funereal passages of the Senator's deliverance upon this occasion.

It shows how the dominating spirit of the President can ride the whirlwind when he has made up his mind to legislate, and how in absolute defiance of the laws of nature he can produce a senatorial vacuum beneath the sweep of his mighty genius.

MR. FORAKER—Mr. President, I do not care to discuss this question beyond saying something similar to that which has just been said by the Senator from West Virginia.

I remember, when the proposition was before the Senate some time ago, as to whether we should adopt the Panama or the Nicaragua route, I was greatly influenced in favor of the Panama route, as no doubt many other Senators were by the fact stated at page 11, according to the print I have before me, of Report 783, part 2, Fifty-seventh Congress, first session, where the Inter-oceanic Canal Committee, or a majority at least of its members"—

MR. KITTREDGE—A minority.

MR. FORAKER—Yes; it was a minority report I was looking to see. A minority of the members of that committee set forth the advantages of the Panama route, as contrasted with the Nicaragua route, and then, after they had enumerated nine specific advantages, they added the following:

"10. It is recognized that a sea-level canal is the ideal. The Panama Canal may be either constructed as a sea-level canal or may be subsequently converted into one. On the other hand, no sea-level canal will ever be possible on the Nicaragua route."

Now, like the Senator from West Virginia, I had remained of the idea ever since until within the last two or three months, when this discussion was commenced, that it was the part of wisdom to build a sea-level canal, and I supposed that would be the result of the investigations that were being made by the committee. I did not have time, because occupied with other work, to follow the hearings before that committee and read the testimony as it was taken and printed from

day to day for the benefit of the committee and for the benefit of Senators.

I was therefore, somewhat unprepared when, a few days ago, it was insisted that we should settle this matter at this time by voting upon it. I then made a request that there might be further time than was proposed to be given us in order that we might investigate this subject and read the testimony to obtain further information.

But we are to vote, and every Senator must speak for himself in a few minutes. There is no time to investigate further, and I propose, although with some misgiving as to whether that is the wisest thing to do, to follow what has been indicated as the preference of those who have the greatest responsibility with respect to this canal.

As I have intimated before in reference to this matter, I did not take the floor for the purpose of discussing it. I only took the floor to express the doubt I have and the regret I have that I can not vote as I propose to vote, with greater satisfaction to myself.

I come now to an incident to which I would prefer not to allude. It bears, however, so directly upon the proposition that I am discussing that I think it is my duty to make reference to it. It illustrates in a marked degree, more than any other episode of the present Administration, that in the exercise of his prerogative, the President does not feel himself bound by law or precedent whenever he is in pursuit of an object that it is his purpose to accomplish. After the court of inquiry had passed upon the case of Admiral Schley, an appeal was taken by the Admiral to the President, under the regulations of the Naval Code. There was an enormous record in the case, and it was the duty of the President to decide upon the record and the testimony that it contained. He occupied the same position as the judges of an appellate tribunal do when they are reviewing the decision of an inferior jurisdiction. Assuming now that he had the right to reopen the case and take testimony upon his own motion, he had, of course, no right to do this except in the presence of Admiral Schley or his counsel, and with their right to cross-examine any witness that was produced. The American bar, or that portion of the bar unacquainted with this proceeding, will hardly believe it until they read it,

that the President conducted this appeal in utter disregard of the rights of Admiral Schley, ignoring every principle of common law and statutory procedure, and in violation at least of the spirit of the Constitution, which provides that in all criminal prosecutions "the accused shall be confronted with the witnesses against him and have compulsory process for obtaining witnesses in his favor."

No one can doubt that this was in the nature of a criminal proceeding, although not within the letter of the Constitution. The penalties and punishment attending a decision against the accused were as severe as any that could be inflicted for a violation of any of the laws of his country. The President never gave the Admiral the slightest notice that he intended to reopen the case; never confronted him with the witnesses against him; never allowed him any process for obtaining witnesses in his behalf, and never permitted the assistance of any counsel for the defense. In fact, Admiral Schley never received the slightest warning or notice that his case was to be reopened or treated *de novo* in relation to any of the issues involved.

The most important question in the case was in relation to the command at Santiago on the day of the battle. When the appeal came before the President, he summoned the captains of the squadron and *ex parte*, without any trial or opportunity of defense, upon their uncorroborated testimony, which was excluded at the hearing before the court of inquiry, rendered a decision adverse to Admiral Schley upon all the points in controversy. If the Admiral had been present either in person or by counsel, or had been allowed to offer any testimony, he could easily have discredited and impeached the evidence against him. Such a trial as this, if it can be dignified by the name of trial, never took place in any civilized country upon the pages of history since the court of star chamber, unfettered by the rules of law and employed by James I and Charles I to

arrest the advance of civil and religious liberty, was relegated to infamy and oblivion.

Captain Evans, the principle witness against Admiral Schley, was his bitter and malignant foe. He testified before the President that he considered himself under the command of Admiral Sampson throughout the battle, and that he would not have heeded any orders from the *Brooklyn* even if he had received them. The President had before him 50 pages of testimony demonstrating with mathematical accuracy that Admiral Sampson could not possibly have been in command of the battle, as he was more than 10 miles distant from the scene of action when the battle began, and never made his appearance until the battle was over, and an hour and a quarter after the last of the ships, the *Cristobal Colon*, had struck her colors and surrendered.

The proof was overwhelming that the distance at this time between the flagship of Admiral Sampson and the *Brooklyn* was fully 17 miles, and that Admiral Sampson was not and could not have been in command when the battle took place. If Captain Evans was testifying truthfully when he stated to the President that he would not have heeded any orders from the *Brooklyn*, the President should have immediately ordered a court-martial in the case, because Admiral Schley was the senior officer of the squadron under the rules of warfare, under the statutes of the United States, and under its naval regulations. When the Spanish ships attempted to escape upon the morning of July 3, it was the duty of Captain Evans, whether he wanted to do so or not, to heed and follow Admiral Schley's signal.

On the morning of July 3, at 10 o'clock, Admiral Sampson signaled to the fleet, "Disregard the motions of the Commander in Chief," and according to the regulations for the government of the Navy of the United States, the command from that moment devolved upon Admiral Schley. I shall not

enter upon the details of this case to any further extent. I have only adverted to the statement of Captain Evans to show the kind of testimony that influenced the mind of the President, and the error that he committed in violation of the cardinal principles of the common law, in not permitting Admiral Schley to be confronted by the witnesses who were against him, and who had been summoned by the President to testify to facts that were ruled out at the hearing.

It must be observed that the few officers whose testimony bore against Admiral Schley before the President were his personal enemies, and did not want him to receive any credit for his conduct at Santiago. In fact, long before the battle they had been hostile to him and envious of him. They had stood like "greyhounds in the slips, straining at the start."

The President says that "this controversy should not be kept alive; to do so would merely do damage to the Navy and the country." It, however, shall be kept alive. The conviction of an innocent man is of more concern and importance to the country than the repose and security of a naval ring, however influential and powerful it may be. Men stood ready in the Senate and House of Representatives to rectify this wrong at the time the President rendered his decision, and were prepared to pass some legislative action that would strike this judgment from the naval records of the country, but the President had said that there should not be any further agitation of this controversy, and thus in his legislative capacity he procured a silent confirmation of the judgment he had rendered in his executive capacity. Let me tell you that the agitation will not cease. The time will come when this case shall be reopened just as a similar case has recently been reopened in another land, where an innocent man had been hunted to torment and degradation by the scorpions of religious hatred and venom until, to the eternal credit of a liberty-loving people, his sentence reversed, his innocence established, his loyalty vindicated,

and his name restored to the roll of honor, he stands today exalted by the ordeal through which he has passed, the pride of France, and the idol of his countrymen.

Admiral Schley shall be heard. Living or dead, his cause shall be heard. I have never known an injustice of this sort to have been done that the occasion did not arise to redress it. No such melancholy page as this shall blur the annals of our history. It is said that the public opinion of the country is with Admiral Schley, and that he has been honored with its verdict. This is true, but it will not suffice. We know that public opinion changes very quickly. It will not do to rely upon it. Today it sends forth its anathemas of hate. Tomorrow it builds its monuments of love. The march to immortality is often made amid the poisoned shafts of envy and of malice, and the birthplace of a deathless name is generally found amid the ruins of public opinion.

The public opinion of future ages will not be guided by what the public opinion of this hour is, because it will have no means of ascertaining it except from the record, and the record is against him. Other countries remember and dignify their heroes, but in this case Schley was humiliated by the President's suggestion that he "ought not to have weighed danger, and that it was his trade to dare greatly for the honor of the flag."

The heroes of antiquity were always worshiped and exalted. Greece inscribed their names and deeds in her temples and upon her shrines. "Such honors Ilion to her heroes paid." To this day there can be seen a representation of the triumphant entry of Titus into Rome upon a marble arch erected in his honor by the Roman senate seventy years after the Christian era. Schley might well exclaim in his retirement to the Republic: "Oh, Ingratitude, thou marble-hearted fiend!" But he thinks none the less of his country because of the treatment he has received. The man, who at Santiago, according to the

testimony, stood at an exposed position upon his vessel, with his head erect, when every head was bowed but his, as the enemy's shells were plowing his ship, should not have been thus reproached. If his own country is cruel and forgetful enough to punish him for his love and sacrifice for her, then I predict that the day will come when at least his countrymen will erect some imperishable memorial, whose inscription will not only attest his valorous deeds to all enduring time, but will obliterate the admonition now written upon the naval records of the country that war is a trade. It was his duty to dare greatly for the honor of the flag, a flag he had carried from the Orient to the Arctic sea, and to whose colors he was as true "as the needle to the pole or the dial to the sun."

Now let us look for a moment at the result of the President's construction of his prerogative. A new sect of political scribes have commenced to edit a revised edition of the Constitution. They call it the unwritten Constitution. They are framing an apocryphal collection of epistles and are promulgating their heresy from academic chairs and lecture platforms. The President is the prophet of this new creed and the messiah of this strange hallucination. They do not propose to add any additional chapters to the original manuscript, but they insist that under the general-welfare clause, which is simply a repetition of the phrase that was used in the Articles of Confederation, this Government has implied powers not enunciated in the charter. They seem to forget that Hamilton's proposition in the Constitutional Convention, which provided that Congress was to have power to pass all laws whatsoever, subject to the Executive veto, and the outline that he communicated to Mr. Madison, that the Legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defense and welfare of the Union, were not even referred to the committee, and that it was in the plan presented by Patterson and by Randolph and by Pinckney that there was

finally evolved that immortal scheme that can never be recast under the plastic touch of political necromancers and enchanters.

When they approach the executive department the implication becomes unlimited, and under the distribution of Executive power the President can perform all functions not allotted to other branches of the Government.

I know that Congress has enacted a great many laws enabling the President to perform the duties confided to him by the Constitution. It has done this under Article I, section 8, sub-section 18, of the Constitution, which provides that—

Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Hamilton, in discussing this clause of the Constitution, said that—

The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.

There has been a considerable diversity of opinion upon this point. Chief Justice Marshall illumined the proposition in this manner. He said:

Should Congress in the execution of its powers adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power.

And there I stand. No one at this day would demand a literal construction of the Constitution which would deprive

the President of performing functions necessary to carry out the powers that are granted to him. On the contrary, he has the broadest field of discretion within which to adopt and exercise whatever methods are proper for this purpose. What I insist upon and contend for is that he must never abuse his constitutional prerogative by invading the domain of other departments, and must never, under color of title, assume authority upon subjects that have no relation to his office, and do not in the remotest degree appertain to the performance of his executive functions.

We know that every word of the Constitution is written. We know that there is not a line or letter that anyone has the right to insert. The Supreme Court may interpret, it may construe according to the spirit, but it can never add to the text. The Supreme Court may hold that a given act of the Executive is not an interference with legislative functions. It may broaden the right of the President to negotiate a treaty, but if it were ever to decide that the President had a right to conclude a treaty without the constitutional ratification, its adjudication would lead either to impeachment or revolution. Every judgment, decree, and order that it renders must be under, and not above and beyond, the Constitution. It can set aside an act of Congress, but it can not abridge or extend the limits of the charter. What the Supreme Court can not do by expression, the Executive ought not to be allowed to do by implication.

The President has the right to veto any enactment that we may pass. He has the right, if he chooses to do so, to advise with members in reference to legislation, and to make any suggestions that he may deem proper. This is not a constitutional prerogative, and its propriety has been questioned and assailed, but I am willing within proper bounds to regard it as an incident of his executive functions. One thing he has no right to do, and that is to use the vast public patronage at his dis-

posal to compel obedience to his views. Another thing he has no right to do, and that is to make compacts with the Speaker of the House of Representatives or its committees, to accomplish the legislation that he desires, or prevent legislation. And still another thing he has no right to do, and that is, beyond his messages, in which he is given the right at any time to suggest any measure he may deem proper or necessary, to interfere with legislation and to force Congress either to adopt his recommendations or, if it rejects them, to bring about a breach between the legislative and executive departments that is detrimental to the best interests of the country. That constitutes an assumption of dictatorial power which the people of this Republic, in the course of time, will not submit to, I care not how great the achievement, of how much it may conduce to their progress and welfare, or what benefit, advantage or prosperity we may derive from its accomplishment.

In order to show that I have not at all exaggerated the claims and pretensions of this new school of Executive construction, I want now to refer to some extracts from the address of an eminent lawyer, delivered before the New York State Bar Association, in which the doctrines of this creed are announced in such unmistakable and unambiguous terms that we are no longer left in any doubt or uncertainty as to the evolution and development that we are now undergoing upon the cardinal principles of republican government. If the propositions that he maintains reflect the sentiment of the people, then it is safe to say that the Constitution is a thing of shreds and patches, and the Government that it created is as much of a monarchical institution as the Government of Great Britain, or of any other government, with the exception, perhaps, of those of Russia and Turkey, upon the Continent of Europe.

Listen now for a moment to some of the passages from this delightful dissertation upon the Executive prerogative.

1. The President is the chief invention of the Constitution, a personal magistrate for a republic. * * * The conversion of an abstract sovereignty into a concrete sovereign.

2. The executive and magisterial attributes of the Government being invested in the President, it follows invariably that the President must possess the executive and magisterial attributes of the people, and that the people retain no undelegated attributes or passive sovereignties under the Tenth amendment or otherwise.

3. If Southern States abridge the privileges and immunities of Federal negro citizens, the President, on his own initiative, can and should prohibit such action, whether Congress legislates on the subject or not. If Southern States deny the right of suffrage to Federal negro citizens on the ground of race or color, the President, without waiting for penalizing statutes, can and should use every means, civil, military, or both, to stop it.

4. To execute all his omnipotent functions, the people have given the President absolute control of an irresistible physical force, the Army and Navy of 80,000,000 people.

5. Such are the powers of the President, express and implied. They are all plenary. The office and power to execute it are in unqualified language. The power to execute the Constitution is without limitation or restriction. The power to administer the executive sovereignties is complete, and the implied powers are coextensive with the express grants. Hence all the powers of the President are unqualified, plenary, and unlimited.

And now for some of the thrilling climaxes of this remarkable production.

Thus my ideal of the President coincides with the ideal of the people, a majestic constitutional figure uncontrolled by Congress, unrestrained by the courts, vested with plenary constitutional power and absolute constitutional discretion.

How, then, is it possible for the President to exceed his express constitutional authority? What Federal act can he perform that he may not claim is in execution of his office and its attributes, of the Constitution and the laws, or of his executive powers?

Majesty is another attribute. It inheres in every sovereign, be he Czar or President. *Imperium majestasque populi Romani.*

The President is invested with an office and the whole of it * * * Who hath fixed its bounds? Who hath said, Thus far and no further? No one has determined its illimitable extent; no one can determine it so long as the Republic endures.

And this matchless conglomeration of incoherent absurdities was delivered, Mr. President, before an assemblage, every man of whom was probably conversant with the authorities and decisions that have consistently placed the brand of judicial condemnation upon this frenzied exposition of executive sovereignty.

This demonstrates, Mr. President, that the entire trouble arises from the fact that the Constitution is being perverted upon the grant of executive power. Article II of the Constitution says the executive power shall be vested in a President of the United States of America. This does not vest executive power in any greater degree than Article I vests legislative power when it says that all legislative powers herein granted shall be vested in a Congress of the United States, or than Article III vests judicial power except in the Supreme Court of the United States.

I plant myself upon the proposition that the President derives no authority whatever from this clause. Nearly three-quarters of a century ago the greatest political philosophers who ever illustrated the pages of American history settled before this body this contention so that it has been considered a constitutional axiom until the present day. This provision of the Constitution simply relates to the distribution of governmental functions and can not be considered in the light of a grant.

As luminous a constitutional argument as Webster ever made was upon this precise point. The president must derive his authority from the subsequent provisions of the instrument that contains the grant, and the entire grant of power, and which are not in the slightest degree enlarged by the clause that I have quoted. His school of disciples evidently think that I am wrong upon this point and are bewildering the mind of the rising generation upon this proposition. If we were to pass a law here today reposing in the President a governmental

function beyond the specifications of the Constitution and not necessary for the exercise of any power contained in the specifications, the enactment would be void. Now, if the law would be void, what power has the President without the sanction of law to trespass beyond the confines of his prerogative? The President is either the executive officer of the Government, vested with unlimited executive functions, or he is the Executive acting under special and delegated powers. Which is he? Is he the general executive agent of the people, or their immediate representative, as was once claimed by one of his predecessors who also had an erroneous conception of his prerogative? Or is he a special agent who shall look to his commission and credentials for his authority? There are unlimited executive acts performed by monarchical rulers, the exercise of which the framers of the Constitution never intended to repose in the President, and, therefore, they circumscribed his functions.

I am aware that persons who are not familiar with the source of organic power are losing sight of fundamental distinctions and are looking to results and not instrumentalities. I am not surprised at this view, but I am surprised that any men occupying the highest positions in the Government and instructors and text-writers upon constitutional law, should at this hour justify a doctrine that strikes down at its very altar the oracle of our faith and substitutes for it a worship that is only temporary and that can not possibly continue and endure. The day will come, Mr. President, I predict it—it is bound to come—when this illusion will disappear, when the people will retrace their steps. And as they flee from the pagan temple they will bear upon their shoulders the Ark of the Covenant and the scroll of the ancient law.

I am now about to conclude. I do not know that anyone will heed anything that I have said or, when once it is buried among the sepulchral archives of this assemblage that

anyone will read the admonition that I have cast upon the tide of thought, but I desired for my own satisfaction to throw out the warning and intimation that I have given, so that in the future when these questions are discussed and studied I can feel that I have performed my duty in helping to pioneer the way for the investigation.

I believe that if the Democratic party would take up as its battle cry the reserved rights of the States and the inviolate constitutional distinction of the legislative, the judicial, and the executive departments, that we could rally around the doctrine the intelligent suffrages of our countrymen. These provisions constitute the logic and the philosophy of the instrument. I can not quite agree with Gladstone that the American Constitution is the most wonderful work ever struck off in a given time by the brain and purpose of man. I can not agree with him because we all know that the Constitution was not a spontaneous production, but was the result of compromise and of violent and heated controversy. We know that the conflict in the convention at one stage was so irrepressible and the crisis so serious that it became necessary for Benjamin Franklin, who was not renowned for his piety or celebrated for his devotion, to move that in future the sessions be opened with prayer. We also know another fact, and that is, that there never was the slightest division upon the proposition that I have just been arguing, and that so soon as the convention was assembled and organized, the first formal resolution that was presented read as follows :

That a national government ought to be established, consisting of separate legislative, executive and judicial departments.

And from that day to the advent of the present Administration no one has ever doubted the supreme wisdom of this distinction. This is the theory towards which every other article in the Constitution gravitates as the center of attraction. It is this imperishable distinction more than any other provision

that the instrument contains, that makes the Constitution of the United States now read in every living language and at every university, college, and seat of learning where political science is taught. Not only this, but it is perused with fear and trembling by tyrants upon their tottering thrones. Today in the Persian palace, in a land which for over two thousand years has been under the dominion of despots, it is an object-lesson as the dawn of republican government is breaking over that benighted sphere. It is studied in the camp of the revolutionist and by the glimmering light in the dungeon of the political convict and by exiled philosophers in penal colonies and in Siberian mines. At this hour it is the subject of meditation and analysis at every place where freemen assemble to assert the rights that God has given them and which it lies not in the power of any man to deprive them of.

I know it is said that the people do not care, if the accomplishment is for their benefit, what the methods are that are employed to reach it, whether the Constitution is violated or not. The end justifies the means. I do not believe it. I do not believe that the people are in favor of tampering with the Constitution, and, by insidious inroads upon its provisions, paving the way for dictatorial government. At present both parties are cutting loose from its anchorage. The Republican party has in the President a helmsman bold and tactical, who with his chart of aggression and annexation, is steering for foreign shores, gambling on the waves, indifferent as to the depths beneath. The Democratic party, at the present time, it seems to me, is on the wild and tumultuous sea, with different pilots, all trying to steer it in opposite directions, and if it does not quickly take its bearings I fear that it will gradually drift toward that bourn from which no traveler ever returns.

Mr. President, this division of governmental power into executive, legislative, and judicial functions is the arch that supports the bridge of the Constitution. Underneath it is the

chasm in which every government of antiquity that has ignored this distinction lies buried in wreck and ruin. Touch not the arch. If we do the masonry will crumble and the entire fabric will "haste to swift decay." Keep the keystone inviolate and intact, so that no sacrilegious hand shall blast or hew it down, and the whole majestic structure shall time defy, as rocks resist the billows and the sky.

ADDRESS UPON THE PUBLIC SERVICES OF ARTHUR P. GORMAN.

On February 1, 1907, the Senate pronounced eulogies upon the life and character of the late Senator from Maryland, Senator Rayner delivering the first oration of the occasion.

Mr. President, this is one of the many recurring occasions upon which this body is called together to pay tribute to the memory of its departed members. It is proper that these proceedings should take place because it seems to me that the dead are soon forgotten beyond the immediate circle that surrounds them, that it is well in cases where men in public life have been of service to their country that there should be some public reminder and memorial of their deeds. Senator GORMAN was for a long time a distinguished figure here. He was, during the greater part of his political career, the recognized leader of the Democratic party in his State, and for some years its leader in the Nation. It is entirely within the bounds to say that during all this time he exercised a commanding influence in the councils of his party, and by virtue of his long experience and sagacity occupied a most prominent position among its foremost men. He possessed, to a remarkable degree, the qualifications of political leadership.

The question is often asked: What are the elements that constitute these qualifications? This is a difficult

question to answer. Political leaders, in a great degree, resemble all other leaders in the various walks of war and peace—in the professions, in literature, and in the ranks of commercial enterprise and business activity. They are born, not made. A man, if he has the talent for his vocation, may cultivate and develop it, but I have never believed that he could create it. It is a peculiar gift that is made up of so many parts that the absence of any one of them would fail to produce the whole. The entire combination in its natural and delicate proportions must exist in order to bring about the effect that is known as leadership. It is a power of mind and singularity of temperament united.

Senator GORMAN, at an early age, appeared upon the political arena, and he received his training from the masters of the art. His preceptors were the formidable chieftains of the earlier days, who formulated great political principles and pioneered the way through the wilderness, often without any guide or compass to direct them upon their journey. Party lines were then closely drawn, and the first lesson that Senator GORMAN learned was the lesson of discipline. He carried it through life with him. It is very difficult for anyone to erase impressions that have thus been stamped upon him, and the instructions that we receive and the opinions we form and the convictions we acquire as our intellectual faculties are being developed, as a rule, become indelible in our maturer years.

Our political sentiments are generally bequeathed to us, and even our religious faith comes to us from the remotest ancestry. In our beliefs, as well as in our habits, we are often the subjects of a fate as unbending and inexorable as the laws of nature. Senator GORMAN was trained in a school in which party loyalty was the alphabet, the curriculum, the test and passport for honor and promotion. He was naturally a man of positive purpose and of remarkable power of will, but he always believed in the doctrine that the party was greater than

the individual, and if there was a difference of opinion it was the duty of the individual to surrender and sacrifice his own views at the altars of his party loyalty and allegiance. At the time when he first became prominently active in party affairs, all the great political leaders were imbued with these ideas and had been disciples of that school. At present, the political tide has changed, and there is a vast body of independent voters in this country who fluctuate according to the men and measures that are presented to their suffrages.

Citizens with these proclivities work to a greater advantage in State and municipal politics than they do in national controversies, and we must all admit that their influence has been productive of the greatest good in the various communities in which they appear. One thing is certain, however, and that is, in time of heated party conflict a party to succeed must have discipline, organization, and leadership, and it was in the heat of party conflict that Senator GORMAN exhibited his talents and accomplishments. When others became disconcerted he preserved his equanimity, and by his unruffled demeanor and his undisturbed self-possession infused courage and confidence among his followers. At times when defeat seemed imminent and his supporters were discouraged and dismayed, and his hosts were trembling, his gift of leadership appeared to the best advantage. He may have felt doubtful about the result. He may have clearly perceived that there was danger threatening, but if these thoughts occupied his mind, he never betrayed them, and he never disclosed them, even to those who were most intimately associated with him in the management of party affairs.

If I could properly summarize what political leadership meant in his case, I would speak of it as follows: It meant the power to analyze the situation and not to be deceived by misleading appearances, and the faculty of discerning the true condition of public opinion. It carried with it necessarily a degree of per-

sonal magnetism that often turned his bitterest enemies into his warmest friends. It meant courage and judgment at critical periods and in the hour of emergency, and what is greater than all, it meant what I call, for the want of a better name, the genius of organization. This genius of organization is an endowment and not an acquirement. Some men of great force and intellect possess it, while with others similarly equipped it is entirely wanting. It is the power and the instrument of system and of method. The man who wields this weapon must be a man of purpose, of reserve, and of equilibrium. Senator GORMAN possessed all these attributes. It requires a thorough insight into human nature. It is the peculiar skill of accomplishing those things that are demanded by circumstances and the tact to make the best use of opportunities and occasions as they present themselves. It demands a fixed purpose, and a steady nerve and a resourceful mind, and then, above all these things comes the ability to instill into your subordinates the inspiration of your example and to infuse into the masses to whom you look for results, the zeal and enthusiasm that are the accompaniments of success.

Of course, a man who has occupied, like Senator GORMAN, a position of this sort, is bound to create hostility. Like every one else similarly situated, he had hosts of friends and hosts of enemies. There is one thing remarkable about his career, however, and that is he had few, if any, personal enemies. The elements that were inimical to him entertained no unfriendly feeling toward him personally.

As a rule, every political leader is surrounded by a retinue of friends who follow him in order to participate with him in his victories and often desert and betray him when disaster overtakes him. Senator GORMAN's situation was peculiar in this respect. He had made friends who were as loyal to him when his fortunes wavered as they were in the hour of his greatest triumph. At one of the largest political meetings held

in our State during the last Congressional canvass the mention of his name elicited as much applause from the ranks of the party as if his living figure had stood before the assemblage. He always believed in the precept, "The friends thou hast and their adoption tried, grapple them to thy soul with hooks of steel."

His force was that of attraction and not of repulsion. Without being demonstrative, his bearing was at all times genial, his carriage and intercourse with his fellow-men were without the slightest pomp or pageantry, and he was always accessible to the humblest one of his constituents. He never sat in state, and he gathered no delight whatever from display or ostentation. He had too much wisdom for pride or vanity or exaltation. Vanity is generally the attribute of weak minds and of persons who glide along the surface—those who are thoughtful and profound are as a rule humble and lowly. Some one said of Francis Bacon that he was fraught with all the learning of the past and almost prescient of the future, but too wise not to know his weakness and too philosophic not to feel his ignorance.

Mr. GORMAN was devoted to his work in the Senate. He had dedicated to it the best years and energies of his life, and had thoroughly understood and mastered it. Senators who served with him upon committees here will bear testimony to his faithful attention to the duties that devolved upon him, his untiring industry, his assiduous consideration of every practical problem that was submitted to him, his capacity for constructive legislation, the analytical methods that he pursued in his work, the experience that he brought to play in dealing with important questions of governmental expenditures, and his faculty of summarizing propositions upon this floor in a manner that made them easily comprehended.

When we think of it, his career was a remarkable one. He had risen from an humble position in this body to the highest

and most commanding station. It was not the extraneous influence of good fortune that had visited upon him the successive preferments that he received, nor did he claim the advantage of a great ancestral line from whom he might have derived the heritage of honor and fame. He advanced from place to place, first in the General Assembly, then to the leadership of the party organization in his State, then to the Senate here, and his leadership of his party, and then to the command of his party forces in the country, simply because he possessed the power and the qualifications that entitled him to these distinctions. These places were not gifts to him, nor awarded to him because of any seniority of service in the ranks of his party, nor in accordance with any rule, custom, or usage, but because it was discerned by those who knew him best and were fully capable of judging of his merits that he had the natural qualifications to successfully perform these important functions. And in his palmy days he never disappointed his followers, and never fell below the expectations that were entertained of him.

If I were asked to select the most important service that our lamented friend rendered to his party beyond these halls, I would refer to the part he took in the election of Mr. Cleveland for President. His tireless and incessant work upon this occasion will be long remembered—that is to say, it should be remembered. I do not believe that at a time of this sort it is proper to indulge in undue adulation of those whose memory we are honoring or to bestow exaggerated praise above what merit calls for, and I am sure that Senator GORMAN, if he were living, would not appreciate any laudatory statements of any services that he had ever performed, either for his party or his country, that he was not fully entitled to. I will, therefore, not say that his efforts elected Mr. Cleveland to the Presidency, but I will, without hesitation, say that he did more than any other single individual toward the consummation of that victory. He was an untiring worker when he applied himself to

the accomplishment of any purpose that he had in view—covering every detail of the program before him and not overlooking the slightest minutiae that could be of any advantage to him whatever.

In this contest he had before him a political geography of the United States, with all of its territory and environment. He studied every State, city, and district where there was a hope of Democratic success. He kept in constant view every stronghold of his own party and every weak and unprotected point in the fortifications of the enemy. He permitted no spot to escape him where it was possible to make an inroad upon the possessions of the foe. He brought himself into personal contact with all the party leaders all over the land. He dismissed from his consideration every place where success was impossible and effected a thorough organization in all places where there was a hope of victory. It was an enormous work of immense proportions, and the result demonstrated that in its prosecution and its triumphant termination he simply outgeneraled the chieftains of the Republican party, and, working at a disadvantage against them, overcame them by the craft and skill of his political leadership. Of course, the Democratic hosts were with him, and the independent vote of the country was really the balance of power that decided the contest, but beyond it all was a thorough and perfect organization, disciplined and marshaled by Senator GORMAN.

If I were asked to name the most valuable service that he rendered to his party—and, I believe, to the country—in the Senate, I would immediately select his memorable work in connection with the defeat of the measure known as the force bill in the Fifty-first Congress. I think the Republican Senators upon this floor have long ago arrived at the conclusion that the passage of this bill would have been detrimental to the best interests of the people. Whatever differences of opinion existed at the time in connection therewith, when party spirit ran high,

it is my judgment now that the result of this great struggle has been accepted as final by the intelligence and patriotism of the Republican party. At the time, however, it was as fierce a conflict as ever engaged the attention of the country, and, with the fate of the enactment trembling in the balance during many months, there was a period of great excitement. Party sentiment was aroused to an intense degree, and into this conflict Senator GORMAN threw himself with an earnestness of purpose that can never be forgotten.

He was the leader of his party in that contest, and if it had not been for his devotion to the cause he was championing, for his parliamentary skill in the resourceful attacks which he made when defeat seemed certain, and for the restless labor he underwent throughout the wearisome days of that momentous period, we might today, instead of having the South united in the interest of the Union and pervaded by a spirit of patriotism as earnest and as ardent as any that throbs in the heart of any other section of this country, have every one of her Commonwealths submerged in ruin and disaster, with their spirits broken, their enterprise retarded, and their entire territory, with the glorious progress that awaits it, converted into a desolated and subjugated political province.

I desire to refer now to one of the qualities of his private life which deserves mention. I have been informed by friends of Senator GORMAN, who were upon terms of the closest intimacy with him, that, while he did not indulge in any ostentatious acts of philanthropy, that he was constantly engaged in acts of private benevolence and charity, and that any appeal of poverty or of suffering always awakened his tenderest sympathy and his ready response. This is the heart and essence of true religion. When the time arrives for us to take a final reckoning with our life and balance the account, deeds like this are of more priceless value than all the accomplishments

of ambition, all the achievements of fortune and fame,
all the possessions of power and of worldly glory and renown.

For modes of faith let graceless zealots fight,
His can't be wrong whose life is in the right.

I come now briefly to another phase of Senator GORMAN'S life which I shall pass over tenderly, because I think it is too sacred for intrusion, even upon an occasion of this sort. The best impulses of his heart seemed to radiate around the glare of his fireside and the circle of his family. His happiest and most contented hours were passed among those to whom he was bound by the bonds of affection and for whose comfort and well-being he was at all times prepared to make any sacrifice invoked by love or duty. He found but slight amusement and took only passing interest in the pleasures of the world, and he centered his deepest devotion upon the altar of his home. His fondest hopes clustered around those who looked to him for aid and for counsel as they grew to manhood and womanhood under his fostering care.

I believe that if Senator GORMAN at any time would have been required to have taken his choice between the accomplishment of his own ambition and his duty to those dependent upon him, he would not have hesitated a moment in making the election. As full of ambition as he was, he would have abandoned the worship of its idols for the idols of his household. Our home is really the holiest spot on earth. It is the oasis in the trackless desert and the fountain amidst the parched and thirsty longings for restless power and aspirations unattained. As years go by the fleeting phantoms of political honor recede from view and we gladly retrace our steps to the temple we have reared—our own architecture—so that we may strengthen its pillars and rear its spires toward the sky.

There is no word or phrase in any language, dead or living, that I know of that carries with it the full significance of the



English word "home." It is not capable of translation, or even of definition or interpretation, and I hope, therefore, that the day will never come when any iconoclast will change the orthography of that Anglo-Saxon term and destroy the memories and imagery that cluster around its meaning.

And now his pilgrimage is ended and he is in his eternal home, where the mystery is unfolded—a mystery that neither philosophy nor science has ever solved. We have unbosomed the secrets of the earth, exposed the cycles of geologic time and gazed into revolving planets, but we stand aghast and dumb at the problem of man's creation. We can explain from a natural standpoint almost everything except the most vital of them all, and that is the problem of our existence. Upon this subject we can gather as much information from the unlettered savage as we can from the profoundest thought that ever dawned upon the earth. The most learned scientist of the present age has written a volume entitled "The Riddle of the Universe," in which he has essayed modestly to solve the riddle. But the last page of this remarkable production leaves us absolutely forlorn, comfortless, and deserted, the human heart without an aspiration, and the universe an utter scene of desolation.

The German philosopher, Goethe, the profoundest student of his age, when one of his companions was communicating to him his doubts upon the authenticity of revealed religion, said, "My friend, give me some faith—I have sufficient doubts of my own without requiring them to be supplemented." The cynic, Rabelais, exclaimed, "Ring down the curtain; the farce is done." Spinoza, the outlaw of the synagogue and the greatest of them all, stood like a solitary sentinel upon the confines of the universe in communion with his Creator and constructed a system which has made him the idol of the philosophical world.

Mr. President, I have pored for years over this cheerless

desire of human thought, and while I am a firm believer in the absolute liberty of thought, I can say what has been well said upon another occasion, that my warm love of genuine liberty has never chilled me into rebellion with its author, and so I believe it was with our departed friend.

That is the impression he left on me upon the last occasion when I met him. I questioned him then in regard to his health, and while I had the gloomiest forebodings of the mortal malady that seemed to encompass him, I was extremely careful not to communicate my thoughts, or to give him the slightest evidence of my feelings in that regard. He was a man of courage, and when he informed me that his physician had admonished him that his heart was seriously and perhaps fatally involved, one of the most beautiful of all poetic thoughts came speedily to my mind, because it was so appropriate to the occasion, that :

Our hearts though stout and brave,
Still like muffled drums are beating
Funeral marches to the grave.

I am told that he met death as he had passed through many critical vicissitudes of his active and remarkable career, with composure, with resignation, with fortitude, and with hope. The chamber of death always presents a scene of sorrow and often of despair, but penetrating the gloom there is a conviction more potent than all the processes of reasoning, that this can not be a finality in Creation's work, and that the soul can not perish when the chords and keys that gave it utterance are broken. Reason as we will, this belief, as the years go by, becomes a sacred and a divine inspiration, an inspiration that grows stronger and stronger as the frail tenement that contains it weakens and dissolves until, at the very moment of dissolution, in every life consecrated to some sublime and lofty purpose, it blazes forth and penetrates into distant realms with all the radiance of the morning sun.

SUPPORTING THE CREDENTIALS OF JOHN
WALTER SMITH.

Perhaps the ablest extemporaneous argument ever delivered by Senator Rayner was that on March 26, 1906, when he successfully contended that Senator-elect Smith, from his State, was entitled to be seated.

I shall be very much mistaken if I can not convince the Senate, within a very short time, that the Senator from Michigan has fallen into an error upon the question under discussion. I shall do this principally by precedents that I have that I think conclusively settle the matter.

I wish to state, in the first place, that there is no contestant here at all. There is no protest whatever against the seating of the Senator-elect. Governor Whyte died last Tuesday a week at 7 o'clock. The General Assembly of Maryland, then in session, had immediate notice of his death. The law does not speak of any official notice, and does not require any.

On the following Tuesday—that is to say, Tuesday of this week—the two Houses initiated their proceedings for the election of a Senator to fill the unexpired term of Senator Whyte. They met on Tuesday for that purpose, and yesterday, Wednesday, met in joint convention. The Senator-elect who is now present, was declared, in accordance with the law, to have received the majority of votes, and to be the duly elected Senator. The Legislature of Maryland adjourns next Monday by constitutional limitation. If the Senator is right in what he states, Maryland will be without its proper representation upon this floor.

Mr. President, we do not propose to call an extra session of the Legislature of Maryland if the Senator from Maryland is entitled to be sworn in, as I contend that he is. There is no constitutional inhibition upon the Governor, but the Governor

does not propose to do it, and the people of Maryland do not want him to do it. If I am right in the position I am now assuming, the Senator-elect has a right to be sworn in; whatever question may arise in the Committee on Privileges and Elections after the oath is taken, the question now is upon his right to be sworn in upon the face of his credentials.

Now, Mr. President, I shall be very brief about this matter. Governor Whyte died last Tuesday a week. The second Tuesday after the legislature had organized had long since passed. Right at the threshold of this discussion, I want the Senator from Michigan to understand that I am now construing this statute. I am construing what this ambiguous section means if it is possible to get a construction of it. Now comes these words:

And has notice of such vacancy.

It does not say two Tuesdays must elapse after the notice is given. There is not a word in the section about that. There is not one word there that by any legal construction that I have ever heard of would permit the Senate to say that when the section says "has notice" two Tuesdays must elapse between the time of the notice and the time that proceedings are initiated. I have four different points upon which I claim that the Senator-elect from Maryland is entitled to be sworn in. The first point is that this section ought not to receive the interpretation that the Senator from Michigan has given it. Let me read it:

Whenever, during the session of the legislature of any State, a vacancy occurs in the representation of such State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized.

That is impossible, because if there is a vacancy after the second Tuesday after the legislature has organized it is impossible to fill that vacancy before the vacancy occurs. Therefore, the

section can not mean that at all. You must take this section in connection with the other two sections, and give a decision from the context of all three sections. It will be utterly impossible for proceedings to fill a vacancy to occur on a day when the vacancy does not exist.

Now, the Senator from Michigan wants to construe this section in this way. He wants to interpolate these words. It reads:

Whenever, during the session of the legislature of any State, a vacancy occurs in the representation of such State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized.

I have shown the Senate that that is possible.

The Senator from Michigan wants to interpolate these words:

And on the second Tuesday after the legislature has notice of such vacancy.

There are no words in that section of that sort. You will have to make a bold interpolation right into the body of the section in order to reach the purpose he wants to accomplish. I say, according to his views, not only must the legislature elect, where a vacancy takes place during the session of the legislature, on the second Tuesday, which is impossible, if the Senator is not dead on the second Tuesday, but it is necessary for him to put in the words "and on the second Tuesday after the legislature has notice of such vacancy." There is no such words in that section, and you will have to force those words in in order to get the construction which the Senator from Michigan asks.

Now, Mr. President, what does this section mean? I want Senators to look at it to see whether I am right in having all the other sections taken with it. You must construe the whole act of 1866 together. You can not take just one pro-

vision of an act and give it a construction without looking at the whole of the act. It means this—and the Senate will come to the conclusion that it means it, and if it comes to any other conclusion it is treading on dangerous ground—that an election for United States Senator shall not take place in any event until the second Tuesday after the organization, and it does not mean anything else.

It can not mean anything else without rendering the section absolutely absurd. All those three sections taken together simply mean that an election for United States Senator shall not in any event be held until the second Tuesday after the legislature has organized; and the question of notice has nothing to do with it. After the legislature has organized and there is a vacancy, I submit the legislature has a perfect right, if the second Tuesday has expired, to proceed immediately to the election of a United States Senator, no matter upon what date it took place and no matter when the notice may have been given.

I appeal to every lawyer upon this floor whether there is any other possible construction to be given to this section unless you render absolutely nugatory its terms. I want to call attention to this because this is a matter of great importance. The sixteenth section provides for the election of a Senator in regular form, and it has these words in it:

Shall proceed on the second Tuesday after the meeting and organization.

Now, omitting one section, which merely refers to the proceedings, the next section provides that:

Where a vacancy occurs at the assembling of the legislature, the legislature shall again proceed upon the second Tuesday after the meeting.

In this section, when the vacancy occurs during the session of the legislature, it says—

similar proceedings to fill such vacancy shall be had on the second Tuesday.

It is ridiculous, because there may be no vacancy, as I have shown, and was not in this case until the second Tuesday had expired. Every statute must receive a sensible construction. The Senate will give the construction to this statute that it would receive in any judicial forum. You must take these three sections together and the purport of them is what I have said now frequently.

All they mean is that you can not elect a Senator until the second Tuesday after organization, and they mean nothing else. And when they come to notice it there is no word there that two Tuesdays must have elapsed after notice was given, unless you interpolate into the body of the section, as I have said, the words "and on the second Tuesday after the legislature has notice." There are no such words in the body of that section, and Congress never meant so to legislate. That is my first point, which, I think, settles this controversy.

But I have other points that I shall pass through in rapid succession, which I think will appeal to gentlemen of our profession on this floor, who are accustomed to give opinions upon statutory construction. It is a question we must carefully examine. You can not give an opinion about it simply by reading this section, and taking it according to its strict phraseology. Even taking it that way, however, there is nothing here which says that two Tuesdays must elapse before notice.

Now, let me come to the second point. I want the attention of the Senator from Michigan. These sections are only directory, not mandatory; that is to say, the legislature can not proceed before the second Tuesday, but it can proceed afterwards. The Senate has so decided upon two separate occasions, and I will give you the precedents. If the legislature did not proceed at all on the second Tuesday and proceeded on the

third Tuesday, the election would be perfectly good. I invite the attention of the Senator from Michigan to these propositions of law.

I repeat, this section is only directory; and if the legislature of Maryland had proceeded on the third Tuesday or the fourth Tuesday or the fifth Tuesday, the election would be perfectly good, and this Senate has so determined. I will give you the cases upon that point.

I refer now to the decision in the Hart case, which you will find on page 379 of the Senate Election Cases. You must draw the distinction between what is mandatory in a statute and what is directory. Time is generally directory. On page 379 will be found the case of *Ossian B. Hart v. Abijah Gilbert*. I presume we had then as good a Committee on Privileges and Elections as we ever had in this body. There were then upon that committee, Mr. Trumbull, who was its chairman; Mr. Edmunds was on the committee; Mr. Conkling was on the committee; Mr. Carpenter was on the committee; Mr. Rice and Mr. Stewart were also on the committee, and Mr. Thurman was on the committee. I presume they gave a very profound, and not a passing and superficial examination to the questions which were involved in this controversy.

There were three Senators to be elected by the State of Florida. Two of them were elected in accordance with the act of Congress, but in reference to the third Senator, they did not commence proceedings at all until Thursday. There were no proceedings at all, as directed by the act of 1866, until that day. There were no proceedings on Tuesday at all; and the unanimous report of the committee is as follows:

The legislature by which the sitting member was elected, was the one chosen next preceding the term which would commence on the 4th of March, 1869, and was, therefore, the proper legislature to elect. "The second Tuesday after the meeting and organization of the legislature" was the time prescribed by the act of Congress for initiating the election of Senators, and that was the time when the legislature

proceeded to that business. There being three Senators to elect, it took action on that day only in reference to two of them. Did its failure to take action on that day, and the two subsequent days (which were occupied in electing the first two Senators), in reference to the third Senator, render his election, in all other respects regular, invalid? The committee think not.

There you have a report of a committee, as I have said, composed of Messrs. Trumbull (its chairman), Stewart, Edmunds, Conkling, Rice, Carpenter, and Thurman. Some of them were in Congress when the law was passed. This is a direct decision that under this first section the law was only directory.

There was an election, understand, in Florida for three Senators. Proceedings were initiated in reference to two of them on Tuesday. Nothing was done in reference to the third Senator on Wednesday, and nothing was done until Thursday; and, notwithstanding the language which, as I say, upon an entirely superficial examination may satisfy anyone that it is mandatory, nothing was done upon Tuesday, as set forth in the act of the Assembly. And yet the committee unanimously held that even if the proceedings were initiated on Thursday, instead of Tuesday, the Senator was entitled to his seat.

I have another case right on that point. This first case is conclusive, but I have another one right on the same point, and that is the case of Messrs. Lapham and Miller, found on page 698 of the same volume. If the Senate seeks to make these sections mandatory, the time will come when it will regret it, especially in a case of this kind, with the legislature adjourning, to command the State to call an extra session of its legislature when the election was proper, when the credentials are proper, and there is no contest, and not a single protest against the seating of its representative.

On page 698, the same question arises—Is the statute mandatory or is it directory? This was the committee of which Mr. Hoar was chairman at the time. This was in the election case, as I have said, of Elbridge G. Lapham and Warner Miller.

The memorials set forth five reasons as grounds why these gentlemen should not be allowed to sit here.

This should end it, I think, upon this floor if the first case does not.

This report states :

The memorials set forth five reasons as grounds why these gentlemen should not be allowed to sit here. The first alleges that the legislature did not proceed in separate bodies to vote upon the question until the third Tuesday after notice of the vacancy was communicated by the Governor. The facts are such as to create some controversy as to whether they did proceed on the second Tuesday or the third Tuesday after the notice; but, in any view, the committee are unanimously of the opinion that the legislature was not deprived of its constitutional right to elect Senators to this body.

Now, if those two decisions are law and bind the Senate, the legislature is not bound by the provision of the statute which says the second Tuesday, but can proceed upon the third Tuesday. Of course, if they can proceed upon the third Tuesday, they can proceed upon the fourth Tuesday, or the fifth Tuesday, or upon any Tuesday upon which the legislature sits, or upon any day subsequent to the second Tuesday after organization.

Where is there any law that you must give a mandatory construction to this provision of the statute which by only an interpolation can be made to read that two Tuesdays must elapse after the notice is given?

These cases are much weaker cases than the case I now present, because, as I have said over and over again, there is nothing in the statute whatever—not a word—that any Tuesday shall elapse after notice is given; but it simply uses the words “has notice of such vacancy.” The legislature could have proceeded upon the night of the notice, in accordance with these decisions, if it had so determined, immediately upon having actual notice of Senator Whyte’s death—for the law requires no official notice—it could immediately have proceeded

to elect another Senator in his place, if these decisions mean anything. That is my second point.

My contention is that the legislature has no right to proceed to the election of a United States Senator until the second Tuesday has expired after its organization, and when that second Tuesday expires, if no proceedings have been commenced, under the section it can commence the proceedings on any future day. That is the decision, as the Senator from Pennsylvania will find if he will look into it carefully. I have not read the whole decision, but that is the decision in Gilbert's case, and that is the decision in Lapham and Miller's case.

Now, I come to the third point, to which I want to call the attention of the Senate. The point is this: The Senate of Maryland has decided that the Tuesday upon which this election was held, was the second Tuesday, within the meaning of the statute. They have closed that question, and the Senate has no right collaterally to impeach the verdict of this legislature.

These propositions I am depending upon are all distinct one from another. The legislature of Maryland has decided this matter just precisely as if they had passed an act of assembly, saying that the Tuesday upon which proceedings were commenced was the second Tuesday, because they have elected the Senator upon that day, and, therefore, by his election, so far as the State of Maryland is concerned, have closed the question that this Tuesday was the second Tuesday, and the Senate has no right to question that adjudication. Now, one moment on that. There is no answer to that, I apprehend, from anyone who has examined the cases.

Senator Whyte died last Tuesday a week ago, at 7 o'clock in the evening. Notice was immediately given, because within an hour I will guarantee that every member of the House and Senate knew of his death. Tuesday had not expired.

In our State we did not regard the fraction of a day in this case. The legislature of Maryland has, therefore, determined by its proceedings that the Tuesday following was the second Tuesday. Has the Senate a right to go behind that adjudication? I think not.

The question was up in the election of Senator Turpie, from Indiana. I refer that case to the Senator from Michigan.

It is on page 719. The question in the case of Senator Turpie, of Indiana, was this—and, of course, I am not reading all these cases. I am just giving the purport of them—the claim was made that there were two members of the Senate of Indiana—Senator Turpie having been elected, I think, by a majority of two—that were not entitled to their seats. There were two members in the body who ought not to have been there, and it was with the votes of those two members that Senator Turpie was elected. The Senate committee, again with Mr. Hoar as its chairman, I think, unanimously held—

that as to the two members seated by the Senate so organized, the judgment of the Senate of Indiana was conclusive on the Senate of the United States, and that the latter body could not inquire into the motive of the former.

If the judgment of the Senate of Indiana was conclusive upon the Senate of the United States, upon a question whether a Senator was elected—because the question here was whether he was elected by a sufficient number of votes in the general assembly—how can it be said that the judgment of the State of Maryland as to what constituted the second Tuesday is not conclusive upon the Senate of the United States?

This case is followed by the case—I will not read it, but I will refer it to the chairman of the committee—of Senator Scott, of West Virginia, where the same proposition was determined, on page 892.

This brings me, Mr. President, to the last point, and I now

submit to the Senate that, even if I am wrong on every proposition I have stated, I can not be wrong upon this proposition which I now address to the Senate.

Even if this Tuesday was not the second Tuesday, if the construction of the Senator from Michigan is a correct construction, if this statute is mandatory and not directory, if the verdict of the Maryland legislature can be set aside by the Senate of the United States, then I contend that upon an unbroken line of authority, the credentials being in proper form, the Senator has the right to be sworn in, and the question must go, if at all, to the Committee on Privileges and Elections after he takes his oath and is seated in this body. I will give the cases on that point, and I think there is no question about it. I ask the Senator from Michigan to give me a single case where a Senator was ever denied the right to be sworn in when his credentials were proper and were right, or where they were collaterally impeached, and he was prevented from taking the oath of office. In all these contested-election cases that went to the Committee on Privileges and Elections, where they were controverted and disputed, some of them taking weeks and months for their adjudication, the Senator was sworn in, and the controversy took place after he took his seat. In none of them did the Senator do what the Senator from Michigan now asks the Senate to do, and that is, to send it to the committee, where, perhaps, we can not get a decision until after our legislature adjourns next Monday.

The first case I will give the Senator is the case of Lamar, page 634. This question, I respectfully submit, has passed beyond the pale of controversy, even if the Senator from Michigan is right in his contention. The oath must now be administered, and if there is any attack upon the proceedings, it must afterwards be made in the Committee on Privileges and Elections.

Mr. Lamar was first elected for the term beginning March 4, 1877. Objection being made March 5, 1877, to the oath of office being administered to him, his credentials were laid on the table.

Then :

Mr. Wallace submitted the following resolution for consideration :

Resolved, That the credentials of L. Q. C. Lamar, Senator-elect from the State of Mississippi, be taken from the table and that he be sworn."

Mr. Spencer called for the reading of a report made to the Senate at the first session of the Forty-fourth Congress, by the Committee on Privileges and Elections, on the subject of recent elections in the State of Mississippi.

Mr. Wallace having objected to the reading of the said report.

The Vice-President submitted the question to the Senate: Shall the report be read? and it was determined in the negative.

The question recurring on the resolution of Mr. Wallace.

On motion by Mr. Spencer to amend the resolution by striking out, in the last line thereof, the words "that he be sworn," and in lieu thereof inserting "be referred to the Committee on Privileges and Elections, when the committee shall be appointed."

There was the direct question presented to the Senate that is presented now. An attempt was made to impeach the title of Mr. Lamar as United States Senator. The question that the Senate was called upon to determine was whether he should be sworn in or whether his certificate should be referred to the Committee on Privileges and Elections.

After debate it was determined in the negative—yeas 1, nays 58.

One Senator voting that the credentials be referred to the Committee on Privileges and Elections and fifty-eight Senators voting that he be sworn in.

So it was

Resolved, That the credentials of L. Q. C. Lamar, Senator-elect from the State of Mississippi, be taken from the table and that he be sworn.

Whereupon

The oaths prescribed by law were administered to Mr. Lamar by the Vice-President, and he took his seat in the Senate.

Afterwards the question came up and precisely the same proceedings took place in Senator Morgan's case, on page 636 :

The Senate resumed the consideration of the resolution yesterday submitted by Mr. Bayard, viz :

"Resolved, That the credentials of John T. Morgan, Senator-elect from the State of Alabama, be taken from the table, and that he be sworn."

On motion by Mr. Spencer, to amend the resolution by striking out, in the last line thereof, the words "he be sworn," and in lieu thereof inserting "they be referred to the Committee on Privileges and Elections when appointed."

After debate, it was determined in the negative.

The question recurring on the resolution of Mr. Bayard, it was agreed to, as follows :

"Resolved, That the credentials of John T. Morgan, Senator-elect from the State of Alabama, be taken from the table, and that he be sworn."

Whereupon

Mr. Morgan appeared at the bar of the Senate, and the oaths prescribed by law having been administered to Mr. Morgan by the Vice-President, he took his seat in the Senate.

The same thing took place in the case of Mr. Call, from Florida. There is no case on record at all where the Senate would decline to seat a Senator when his credentials were perfectly proper on their face. I will read from Mr. Call's case, on page 805 :

December 7, 1891, R. H. M. Davidson presented the credentials from the Governor of Florida described in the following case, at the same time a transcript of the proceedings of the two houses of the legislature of Florida in a joint convention, composed of a majority of the members of the two houses, but not of a majority of the members of each, recording what purport to be the election of Wilkinson Call. Mr. Call presented himself on the same day, claiming the right to take the oath by virtue of the proceedings of that joint convention.

* * * *

On motion by Mr. Hoar,

The Senate proceeded to consider the motion yesterday submitted by him, that the oath of office be administered to Wilkinson Call as a Senator from the State of Florida ; and

The motion was agreed to.

Whereupon

Mr. Call appeared, and the oath prescribed by law having been administered to him by the Vice-President, he took his seat in the Senate.

I want to call the attention of the Senator from Michigan to the fact that afterwards, on the motion of Mr. Hoar, it was:

Ordered, That the credentials of Wilkinson Call, and also the credentials of R. H. M. Davidson, claiming a seat in the Senate by appointment of the Governor of Florida, be referred to the Committee on Privileges and Elections.

But not until after the Senator had been sworn. In the case of *Ady v. Martin*, from the State of Kansas, the direct point arose whether the Senator should be sworn in or whether the credentials should be sent to the committee before the oath was administered. In this case Senators will recall the fact that there was a pretense that the legislature that elected him was not a properly organized legislature. It was a very important question, and it was afterwards argued in the Committee on Privileges and Elections.

I ask the special attention of the Senator from Michigan, because I suppose he would feel bound by some decisions of Mr. Hoar on this question, if consideration ought to be paid to precedents or decisions, and this case ought not to be decided upon some individual construction of the statute. The direct question came up in the case of *Ady v. Martin*, on page 812. Here is the statement of Mr. Hoar. That was a hotly contested case for a time in the Committee on Privileges and Elections:

MR. HOAR. The credentials of Mr. Martin seem to be in due form, and to entitle him *prima facie* to be admitted to a seat in the Senate. If there be any question as to his title upon the merits, the Senate can deal with it afterwards. I ask that the oath be administered to Mr. Martin.

Mr. Martin was escorted to the Vice-President's desk by Mr. Peffer, and the oath prescribed by law having been administered to him, he took his seat in the Senate. (Cong. Rec., vol. 25, p. 2.)

That was upon the same day that "Mr. Peffer presented the credentials of John Martin, recently elected a Senator from the State of Kansas." That ought to settle it. What is the answer to that? Is there any answer to this case? An examination of the decisions shows that every one of these Senators

was sworn before the question was submitted to the Committee on Privileges and Elections.

Now, one word more, and I have finished. The same thing occurred in the case of Senator George L. Shoup.

The case of Clagett against Dubois has no connection with this matter at all. The whole question in Clagett *v.* Dubois was, as the Senator from Colorado will recollect, whether the legislature was organized. It was a question whether there was a temporary or permanent organization. That was the whole question in Clagett against Dubois—whether there was a temporary or a permanent organization. I want to point the Senator from Michigan to another thing in Clagett against Dubois. I wish to call attention to this:

The legislature met and organized, as found by your committee, on Monday, December 8, while contestant claims the organization was not effected until Tuesday, December 9; so, in any event, inasmuch as the election of Mr. Dubois took place on Tuesday, December 18—

How was that possible? How can Tuesday be December 9 and Tuesday December 18? Does not that show upon its face that it is a mistake? I suppose the Senator from Massachusetts can answer that question that Tuesday can be December 9 and another Tuesday December 18.

I rest upon these four propositions: First, that the section is not entitled to the interpretation the Senator from Michigan puts upon it; second, that the section is only directory, not mandatory; third, the State of Maryland has decided it; and fourth, if I am all wrong in everything else I have said, the Senator-elect is now entitled to be sworn in, and this question should go to the committee, as has been done in every other case, for further examination. I ask, therefore, that the Senator be sworn in.

Mr. President, before I submit my motion I wish to say a few words more. I think we had better understand exactly

the question before the Senate. The question before the Senate is not the question which the Senator from Pennsylvania, Mr. KNOX, submitted at all. The question before the Senate is, whether the Senator-elect from Maryland shall be sworn in. That is the only question before the Senate. It does not preclude the Senate, or any member of the Senate, or any member of the committee, with reference to any subsequent proceeding that may take place or in regard to any report that may come from the Committee on Privileges and Elections. The Senator from Pennsylvania wants to put this question in a way in which it never yet has been put before the Senate that I know of. If there is any such case, I shall be glad to have it presented. The Senator from Pennsylvania says to take up the case and decide it now finally, not send it to the committee at all, not let the committee act upon it or hear any further arguments upon it, but just upon the presentation of a motion, to swear in a Senator, that the Senate shall consider the whole question, abandon the motion, and consider something that is not before the Senate. I object to that plan, Mr. President.

The motion here is that the Senator shall be sworn. As I say, that does not preclude any further inquiry into the case. The Senator from Pennsylvania says we have had full inquiry. It does not follow that we have had a full inquiry. The Senator-elect is entitled to be represented if he wants to before the Committee on Privileges and Elections. The idea of the Senate determining that this seat is vacant without giving the claimant even a right to appear before the committee, to be represented in person or by counsel, is tyrannical. Therefore, I do not accede to that view at all. The Senator from Pennsylvania says that we ought to determine it here and now upon the arguments made, two or three arguments upon each side, and evidently made—although I confess I have said about all I can say upon the subject—without any extended investigation by those who have participated in the discussion, and by two-

thirds of the Senators—or four-fifths of them, perhaps—with no examination at all.

If the Senate rejects these credentials it will be the first case in the history of the Senate, where the Senate has refused to permit a Senator to be sworn in upon the face of his credentials where the credentials were regular. If there is any other case I should like to hear of it. There is not another case. All these citations of cases, where there was no dispute, amount to nothing. You might as well, in trying a case in court, cite as authorities a lot of cases that have never been tried. No one of the cases which the Senator from Michigan cited was ever brought before the Senate. There is not a contested case which he has cited.

I have given two cases here in which the Senate has decided that where the proceedings were initiated on the third Tuesday, which is not in entire accord with what the Senator from Nebraska, Mr. BURKETT, said, although I am very glad he has reached the result he has in his own mind, because I do not care what his line of reasoning is if he is going to vote for the Senator-elect from Maryland—but in both those cases the Senate held that the statute was directory. That was in Miller's case and in the Florida case. In the case of Hart and Miller the proceedings were not commenced—the Senator from Michigan overlooked that part of the statement—on the second Tuesday, but on the third Tuesday, and the Senate held it made no difference whether they were commenced on the second or the third Tuesday; that the statute was only directory.

I do not go as far as that. It is not necessary. I say the second Tuesday must elapse after organization. I am perfectly willing to admit that that part is mandatory; that it must be the second Tuesday after the organization of the legislature; but I will never admit that the second Tuesday clause comes into this provision with respect to notice, and before you refuse the Senator from Maryland his rights you have to interpolate those

words into the provision as to notice, that two Tuesdays must elapse after notice, when there are no such words in the statute.

It is all right to talk about the reports of committees. We all know that the courts, in an unbroken line of cases, have declined in the construction of statutes to be entirely governed by antecedent matters connected with the legislation. They have taken the view, of course, that the statute merged the proceeding. You may find the report of the committee one way, and you may find the law another way. The law merges the proceedings, and the antecedent proceedings do not always enlighten us in the construction of the law. We are not to decide this case upon any proceedings that took place before the passage of the law.

The filing of the bill, the discussion in the committee room, the reports of the committee are all gone when the law is passed, and the question is not how will you construe those proceedings, but how will you construe the law, and here is the law providing for notice, without saying one word to the effect that two Tuesdays must elapse after the notice is given.

If the legislature proposes not to elect a Senator, it must take the responsibility. If the legislature does not elect, it must take the result. My construction is that the second Tuesday must elapse after organization. It is impossible for me to change my mind about that. But it has nothing whatever to do with notice. They can proceed the day after they get the notice.

I want to announce to the Senate the situation we are in in Maryland. Our constitution provides that the general assembly may continue its sessions so long as, in its judgment, the public interest may require, for a period not more than ninety days. The time of our general assembly expires on Monday night at 12 o'clock. Therefore, we can not elect any member of the United States Senate. It would be impossible for us to

do it. It would be utterly impossible for the general assembly of Maryland to comply with the suggestion of the Senator from Michigan.

This case might not occur again within a long time, because the death of Senator Whyte took place on Tuesday. If it had taken place on Monday, this case would not have arisen. We have not defied any law of Congress or anything of that sort. We have done the very best we could. We could not do anything else. There was nothing else for us to do, because there is no other Tuesday that intervenes so as to entitle us to have an election. The undivided sentiment of our State is against calling an extra session for reasons that it is not necessary for me to enter into now. There is a protest from every part of our State, not only in my own party, but from the Republican party, and from independent sources all through the State, against an extra session. It would incur a useless expense of \$30,000 to \$40,000, and they would be kept in session fifteen days absolutely doing nothing, to settle a technicality, if you can dignify it by that name.

There is no contestant here; there is no protest. You establish no precedent by letting the Senator-elect be sworn in. There is not a single precedent, as I pointed out to the Senator from Michigan, that is established. If the Senator-elect from Maryland is now sworn in, your committee can take up this question, and if you want to declare the seat vacant you can take it up and have a full discussion in the committee, and let us have a full discussion in the Senate.

In none of the cases the Senator from Michigan has cited has the event happened in the manner that this event did, because here the Senator happened to die on a Tuesday which does not permit two Tuesdays to intervene before the adjournment of a legislature.

In not a single case that is cited has that been the case. The whole question here is whether this shall be done in view of the fact that there never has been a Senator rejected here whose credentials were all right. The Senator from Colorado knows as much about these matters as any man in this body, and he agrees with me. Furthermore, he has stated that the only case that has been cited—the case from Pennsylvania—was one where the irregularity upon the credentials of Senator Quay appeared upon the face of the credentials.

Mr. President, we had better be a little careful about this matter. It is not a party question. It is not a question of supporting the dignity of the committee, because your committee has made no report. It is not a question of sustaining the opinion of the honored chairman of that committee, because he has never had the case in hand to make an official report to the Senate. He simply has given his views upon the construction of a statute and, admitting now that his construction is right, there is no reason on this earth why every precedent should be disregarded and the Senator-elect from Maryland should be the first Senator rejected upon the face of perfectly proper credentials in accordance with the statutes of the United States.

I do not think that some members of the Senate fully appreciate the situation. You have never yet rejected a Senator where his credentials were in proper form. You have never yet collaterally impeached the certificate of a Senator by proceedings *dehors* the certificate. It has never been done.

All I ask for here is the exercise of a *prima facie* right. I am not asking the Senate to determine this question. A man may vote today to let the Senator-elect be sworn and vote tomorrow to have his seat vacated, and there is no conflict between his votes. The Senator from Indiana, Mr. BEVERIDGE, who will vote to seat him, may, when the report comes in from the Committee on Privileges and Elections, vote to unseat him, and

he is not bound by anything he has said. He will then be able to examine into the merits. But now the whole question is as to the *prima facie* right of the Senator-elect to be sworn.

The Senator from Michigan is mistaken. He has no precedents. There is no precedent. Give me a single precedent where a Senator appeared at the bar of the Senate with proper credentials and was rejected. If you do, I will ask the Senator-elect from Maryland to leave this presence. There is no such case. I have cited an unbroken line of cases—and the Senator from Michigan has not referred to them, and the Senator from Massachusetts has not referred to them, and no one has referred to them—where in every single instance the Senator-elect was sworn, and the question came up afterwards upon its merits.

I say, follow your precedents. It does not bind you. It does not conclude you. The question then, upon motion of any Senator who so desires it, as it was done upon the motion of Senator Hoar and other Senators in these cases, will be sent to the Committee on Privileges and Elections. The Senator from Maryland will have the right to appear there by counsel, if such a proceeding should occur.

Mr. President, I think this question is of great concern. You are attempting to do a serious thing. You are denying to a State the constitutional right of representation.

I feel the overwhelming work that is on me as a Senator from Maryland, and the State is entitled to two Senators. I think every State is entitled to two Senators. I would leave this Hall before I voted to reject a man on proper credentials from a State. I would say "the State elected you, and now be sworn; and let the committee go into an inquiry about it, if an inquiry is demanded."

The point the Senator from Michigan makes is a mere technicality. It is, in other words, that we must make the inquiry before the Senator-elect is sworn, and not after he is sworn.

Why not let this proposition go to the Committee on Privileges and Elections, and when the Senator who is sworn appears before the Committee have the question there decided, if necessary?

I wish to say, in conclusion, that the Senator from Pennsylvania and the Senator from Michigan and the Senator from Massachusetts have not cited a case to contravene the unbroken line of cases where, if the credentials of a Senator are proper, he is sworn. That is all that I ask.

My motion before the Senate is nothing further than that. I move that the credentials of John Walter Smith, Senator-elect from the State of Maryland, be taken from the table and that he be sworn. Then, after he is sworn, the Senator from Michigan can make a motion that his credentials be referred, as in all those cases it was done, to the Committee on Privileges and Elections, if he so desires. Any other proceeding, Mr. President, would be the gravest injustice, gratuitously inflicted upon a sovereign State that has the right of its constitutional representation in the Senate.

RESERVED RIGHTS OF STATES.

On April 23, 1908, Senator Rayner defended the theory that the powers delegated by the Constitution to the Federal Government should not be enlarged to conflict with the rights of the individual States as guaranteed by the Tenth Amendment.

Mr. President, it has been a custom, more honored in the breach than in the observance, during the sessions of Congress preceding a Presidential election, for Members of both Houses to submit their views upon public questions, to be circulated as campaign literature during the pendency of the contest. I hope that what I propose to say will not be used for that purpose, because I do not believe in the propriety of the practice,

and because I have no such object in view in presenting the proposition that I shall now briefly advert to. The motive that influences me at the present moment is, simply, if I can, to clear away a misapprehension that has taken hold of the public mind in reference to the doctrine of State rights. Since I have been a member of this body it has been advocated by a number of us in discussions upon this floor, and around it there adheres among a large class of people a degree of confusion and misunderstanding, which, in justice to those of us who still take great pride in being denominated States' rights Democrats, should be removed, because we are being constantly charged with being what we are not, and with favoring governmental policies that no longer play a practical part in the settlement of the great questions that are pending before the country.

I will, therefore, now define what I mean by States' rights Democracy. I mean this, nothing less and nothing more: I mean that the rights of the States must be maintained inviolate as intended by the framers of the Constitution; that there must be no perversion of the delegated powers so as to strike down the reservation to the States. And that whatever rights the States possess under the Constitution and under the amendments must remain in tact and unimpaired until, if ever, the Constitution should be changed by the voice of the people, according to the methods that it provides, and the structure of our Government should be diverted from its present conception and design.

We fully realize that we can not stand upon a construction of the Constitution that has been forever settled by contending arms and the adjudication of civil war. We further realize that until the day when, perhaps, some of the decisions may be reversed, we are bound by the judgment of the Supreme Court in interpreting the Constitution. We also know that the fourteenth and fifteenth amendments, unlawfully adopted, it is true, have, nevertheless, become an integral part of our

organic law. At some time they may be repealed or modified in a lawful way by a law-abiding people. If I may be allowed, therefor, to say so, the modern doctrine of States' rights is an old principle, but with a new purpose and a new application. The doctrine has slumbered for nearly half a century, because there were no great forces at work to revive it and the spirit of its principle advocates had been silenced and subdued. It was not until the advent of the present Administration that the lines had been clearly and unmistakably drawn between the purpose, on the one hand, to centralize and concentrate Federal power and Executive prerogative, and the purpose of those who still remain true to the traditions of their faith to rescue, if possible, the States from the impending dangers that confront them.

We are passing through a great crisis of constitutional history. We are doing this unconsciously, to a large extent, but positively and permanently. Nearly all important changes in the form of governments take place in this way, unnoticeable at first, but then when the consummation comes the people wonder how it was accomplished, forgetful of the fact that it is merely the result of the logic of events gradually working its way to its final realization. Some day when the people suddenly discover that the reserved rights of the States have been reduced to a minimum, and that the States have been shorn of their sovereign functions and the whole structure of the Constitution has been changed, they will be startled and will want to know how it came about, and they will want to learn the process by which it can be all undone. It will then be found that it is too late, that the chain is riveted, and that each succeeding link was forged while they were sleeping on their rights. The way to arrest a radical attack upon our institutions is not to wait until the edifice is crumbling, but to guard its approaches and to protect them at every point from the invader's touch. The Supreme Court of the United States is not

the forum within which to make the contest for constitutional rights. The Supreme Court is vested with a tremendous responsibility. There is no appeal from its decrees. It may make the greatest possible mistakes, and there is no way of rectifying them, except by a voluntary reversal of its own decisions. The people are powerless, because the judges are above the people, and there is, therefore, no remedy when the edict is once announced. There is no judicial tribunal on earth possessing the unlimited power that is vested in the Supreme Court of the United States.

Taking it as a whole, not in fragments, but as a unit, I regard it in times gone by, and even at the present hour, as the bulwark of the Constitution. The power to set aside an act of Congress by declaring its legislation unconstitutional is one that was never intended to be reposed in this tribunal by the framers of the instrument. It is a strange historic reminiscence to refer to, that a motion to confer such a jurisdiction was twice voted down in the constitutional convention. Nevertheless, it is a power that the Supreme Court has constantly exercised, and upon many an occasion in the interest of constitutional guarantees of personal freedom and of individual rights. One thing, however, I contend for, and that is that, if there is to be any contest for constitutional rights, we should not enact legislation here of doubtful validity to be remitted to the Supreme Court for its determination. Here upon the floor of Congress is the place to make the contest, and, while we are making it, have it fully understood, so that there can be no mistake about what the contest means.

The storm center around which constitutional discussion is now being waged is the clause that gives Congress the right to regulate commerce between the States. Those of us who can not acquiesce in the novel and original conception of governmental power that is claimed to come within this provision are immediately informed that the Constitution grows and ex-

pands with the progress and development of the country; that when the benighted authors of that document placed the commercial clause among its principal provisions they failed to comprehend that commerce would eventually comprise almost everything contained in the vocabulary; that the right to regulate it would mean the right to destroy it, the right to own the instrumentalities that convey it, to supervise the labor that is engaged in its manufacture, to take jurisdiction over every place where it is produced and handled, and the arbitrary right, without restraint or limit, to control and circumscribe it from the time that it makes its appearance as the raw material of the earth until the finished product is landed in the place of its ultimate destination.

I propose now, under this clause, to give some striking illustrations for the purpose of showing not only what the doctrine of States' rights means at the present moment, but to demonstrate how far the perversion and misinterpretation of the Constitution has proceeded in the direction of minimizing the functions of the State, and expanding beyond the intention and spirit of the instrument the delegated powers of the General Government.

One of the most extreme instances that I can give of the tendency to distort the delegated powers of the Constitution is exemplified in the child-labor bill which was framed by the senior Senator from Indiana, Mr. BEVERIDGE, and was discussed by him in a most interesting and instructive discourse delivered at the last session of the Senate, and which is now under consideration by the Committee on Education and Labor. I entirely agree with the Senator from Indiana in the great moral principle that underlies this bill, and I only wish that I could find constitutional sanction for its passage. At the proper time I shall submit to the Senate a line of authorities, which, in my judgment, withdraws the enactment of such a measure from the provisions of any of the delegated powers of the Con-

stitution. The Senator from Indiana, with the spirit of zealous devotion that always distinguishes him in his advocacy of any cause that enlists the powers of his intellect or the sympathies of his heart, discussed this bill in an address which I have referred to, and which takes rank, in my judgment, with some of the ablest efforts that we have ever heard in this Chamber. But his argument, analytical and comprehensive as it was, illustrates in a marked degree the existence of the constructive and destructive principles that I am discussing, and which is now at work groping its way towards the citadel of our institutions, and which will gradually undermine it, unless in the arena of debate we can challenge it to battle and compel it to retreat.

I read the first section of the bill:

Be it enacted, etc., That six months from and after the passage of this act no carrier of interstate commerce shall transport or accept for transportation the products of any factory or mine in which children under 14 years of age are employed or permitted to work, which products are offered to said interstate carrier by the firm, person or corporation owning or operating said factory or mine, or any officer or agent, or servant thereof, for transportation into any other State or Territory than the one in which said factory is located.

Is it not patent upon its face that this is a bill not to regulate commerce, but to regulate the labor that produces the commerce? Is there any warrant in the Constitution for the exercise of such a power? In order to accomplish its purpose we would have to amend the commerce clause of the Constitution so that it shall read:

That Congress shall have the power to regulate commerce among the States and also the labor that is engaged in its production or manufacture.

Here is the case of the dormant power referred to by the Secretary of State in the celebrated discourse that he delivered some time ago. The States have failed to exercise it

for their mutual and general welfare. Now make your insertion *manuforti* and interpolate it among the delegated powers of the General Government.

The Senator from Indiana, in his views upon this question, has stepped in front of his party lines so radically that even the President, after following him in his message last year, has, by subsequent messages, sounded a slow retreat from the advanced limits of centralization which the Senator from Indiana has reached in the measure that I am now discussing. I will not call these doctrines of the Senator from Indiana Republicanism, but I will distinguish him as the new apostle of the new creed of nationalism and federalism which has sprung up in our midst. He asserts and defends the doctrine that if there is a manufactory in the United States that employs a single child in its establishment, then, under the supervision of Federal inspectors and supervisors and secret-service agents, its business can be destroyed and its whole output of adult labor can be excluded from the channels of interstate commerce. It is so pertinent in this connection, and it is so brief, that I want to read an extract from the opinion of Mr. Justice Lamar, when he was treating a subject that was kindred to the one that I am now discussing.

Justice Lamar, in *Kidd v. Pearson*, in 128 United States:

No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form and use. The fashions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce, and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be vested, to the exclusion of the States, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every

branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States, and it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management.

Advancing a step beyond the principle embraced in this bill, we have another doctrine, and, I regret to say, sustained by high Democratic authority, that Congress ought to pass a law providing that corporations should be limited in the amount of the product that they can consign in other States and that Congress has the right to place an arbitrary figure upon their business transactions when they enter into the channels of interstate commerce. The Constitution makes no classification of corporations or any distinction between them and individuals, and if we have a right to do this with corporations, we have precisely the same right to do it with individuals. We have a bill now before the Senate that substantially embodies this principle. It is a monstrous proposition and one that would finally place every commercial transaction and every business enterprise under Federal supervision. If such a bill should pass, I have no doubt that the Supreme Court would declare it unconstitutional. And as I understand that an attempt will be made to incorporate this provision in the Democratic platform, the people should be made to understand as soon as possible that their Representatives in this body, at least, have still a glimmering recollection of what the Constitution means; that the Democratic party has still a bodyguard of faithful watchers, who will see to it that the party is not thus dismembered in her coming platform while there is yet a spark of life within her veins.

This brings me to another proposition that is more startling than those I have just referred to. Congress is given the

right by the Constitution to establish post-offices and post-roads. The President deduces from this grant the power to control the intrastate railways of the United States that do not pass beyond the boundaries of the State that created them.

This is his language :

Today I wish to say a word to you about the first and most important feature of this task—the control of the common carriers doing an interstate business, a control absolutely vested in the nation, while in so far as the common carriers also transport the mails, it is, in my opinion, probable that whether their business is or is not interstate, it is to the same extent subject to Federal control under that clause of the Constitution granting to the National Government power to establish post-roads, and therefore, by necessary implication, power to take all action necessary in order to keep them at the highest point of efficiency.

I quote it literally, that the business of common carriers, whether interstate or not, is subject to Federal control. This suggestion of the President proceeds beyond anything in the line of Federal centralization that has ever been advocated since the Constitution was adopted. If this construction is correct, it places the Government of the United States right within the boundaries of the State and gives it complete jurisdiction over every internal highway in the country. Every highway either is or can be made a post-road, and, being a post-road, it can be controlled, not only for post-road purposes, as contemplated by the terms of the Constitution, but for all purposes of commerce and traffic that pass over its bed. As the governmental authority prevails whenever it exists under the delegated powers of the Constitution, according to this process of constitutional interpretation, the highways of every State in the Union *ex rei* necessarily pass into the control and jurisdiction of the Federal Government, without any reference whatever to the commerce clause of the Constitution. No judge, no jurist, no court, no text-writer, no expounder or commentator of whom I have ever heard ever conceived such an interpretation as this. The President alone is en-

titled to all the credit and all the glory that attaches to this unheralded discovery. His great intellect perceived in this perfectly innocent grant of the right to establish a post-road for the purpose of carrying the mail, and of a post-office for the purpose of receiving and distributing it, an opportunity to swoop down upon the States and upon their municipalities and deprive them of their right of eminent domain, which is absolutely essential for their local sovereignty and existence.

As a corollary from this constitutional demonstration we have the President recommending in the same address the national incorporation of railroads, and we have heard this scheme earnestly and intelligently advocated upon this floor. I will admit that if we were just assembled in convention and framing a constitution for the United States, that it might possibly be an open question whether interstate-commerce carriers should obtain their franchises from the State or from the National Government. As it is now, these charters, with a few exceptions, have been granted by the State Governments. One State grants the charter and the other States grant the right of way over their respective territories. What do we propose to do about it? This is one of the questions of the future which this new Nationalist, or Socialist party, or whatever name it may be called, that is now looming up on the horizon, proposes to agitate. There is only one way of accomplishing the object, and that is to pass a law that all common carriers shall be prohibited from carrying interstate commerce unless they submit to Federal incorporation. It must be observed that there is nothing in the Constitution that prohibits in express terms the Federal Government from violating the obligation of contracts. The language of section 10 is:

That no State shall pass any law impairing the obligation of contracts.

The principle involved in the Dartmouth College case may therefore, of itself, be no obstacle to the exercise of Federal

power, though the Government can not take property without due process of law.

The point, therefore, that I make is that all the charters, with but few exceptions, will be forfeited under such a law, and that every franchise granted to every common carrier by every State in the Union would be practically vacated. And I predict here now that this is a proposition that we must soon encounter and battle with.

The senior Senator from Indiana says that commerce can be absolutely prohibited between the States, relying upon certain adjudications of the Supreme Court, which I do not believe sustain him. There are bills from our side now before us embodying the same principle.

In other words, let me state the case so that it can be plainly understood. The proposition is, that whenever the commercial clause of the Constitution comes in contact with the reserved rights of the States protected by the tenth amendment, the reserved rights of the States must yield, not by reason of a construction which gives the commercial clause of the Constitution the preference and the right of way, but by a penalty of prohibition. This, by implication, shall be annexed to the power to regulate and by virtue of which an embargo can be laid upon the products of any State unless those who are in possession of its chartered rights and franchises submit to Federal jurisdiction.

It is well to grasp this situation at the threshold, because it is all around us. It is permeating this Senate Chamber and the House of Representatives, and under the particular phase of it that I am now discussing, it simply means that if one State in the Union grants a charter to a railroad and other States through which it passes grant it the right of way over their territory, that both the original and ancillary jurisdiction of the States to create and organize the corporation and enable

it to perform its functions must, under the penalty of prohibition, surrender to Federal jurisdiction, and the common carriers must abdicate all the rights and franchises granted to them by the States of their creation and their domicile.

Having reached this stage of constitutional construction, we come to a proposition now that overtops the whole of them, and by one fell stroke, if it can be successfully maintained, obliterates the framework of our Government.

We have a proposition boldly announced by our Secretary of State, a lawyer of profound intellect and of pre-eminent ability, that if the States do not come to the rescue of the Federal Government, whenever an emergency arises for the exercise of Federal power, that ways will be found which will give the Federal Government the right to exercise the power that it proposes, whether it comes within its delegated functions or not. I said at the last session of Congress in an address before this body upon Executive usurpation, and I repeat it now, that this is the most startling and dangerous doctrine ever announced before the American people. The States have certain dormant powers. Those powers, says the Secretary, when Federal emergency requires it, must be brought into exercise and activity. If they are allowed to remain passive, and if a State does not conduct its legislation with regard to the welfare of all the other States, judicial constructions will be found that will override the reserved rights of the States and transfer their dormant and unexercised power into the hands of the General Government. I have been waiting for a year, with resignation and with patience, for the Secretary to recall this revolutionary utterance, or in some way to temper or to moderate it, but there it still stands as it did upon the day on which it was first uttered, as a letter of marque and reprisal to justify every pirate in his attempt to depredate upon the ship of State. We had better tear the Constitution into shreds and start anew, than have such a manifesto as this, emanating from the heights, thundered

down to Congress and to the Federal circuits of the United States.

It says to Congress: "Pass your unconstitutional laws, and we will see to it that the courts will make them valid by interpolating them into the Constitution."

It is forever an end to the sovereignty of the States within their own jurisdiction. It puts the torch to the framework of the Constitution, and what is worse than all combined, coming from such a distinguished source, it inculcates into the minds of the rising generation a precept, which, if put into practice by those to whom it is addressed, will eventually and inevitably bring dishonor upon the institutions of the country. Fortified by such an authority as this, is there any wonder that the President proposed, through the treaty-making power, to overthrow the local institutions of every Commonwealth of the land with which it came in conflict? The States levy a tax for the support of their local governments, and without asking any help or advice from the Federal Government in this regard, they legislate with reference to the usages and the customs and the needs and requirements of their people.

"But," says the President, "you do all this subject to my right to barter your rights away. You have the right, but I have the power, with the consent of the Senate, to make the treaty, and when the two rights conflict, mine prevails and the States must surrender."

I want to say to the Senate now that, in my opinion, if it had not been for concessions that the State of California made, or for concessions that the foreign government made, either one or the other—I know not which—when this controversy was at its height, we would have had a conflict over this question, led by the President and his Secretary, the result of which it would have been found impossible to foresee.

These are all new propositions that have been born over

night, and this is what we are coming to. And speaking now beyond these halls, to the rising generation, I appeal to them again and again, as I have often done before, not to ignore these insidious attacks upon the institutions of our country. Are we, as proclaimed by the Supreme Court of the United States, an indestructible Union of indestructible States, or is this a Government of inherent power? If so, where is the power that lies in sovereignty and not in grant? We States' Rights Democrats have no purpose whatever to nullify any of the powers of the General Government. As I have said before, States' Rights now are something entirely different from what they were in the days that are past. The old doctrine is buried in the graves of those who sacrificed their fortunes and their lives in its defense, and this new doctrine which I am now discussing was ushered into life with the advent of the present Administration. And the emergencies that have called forth Federal activities absolutely compel us now to inquire what is the limit to their exercise. Is the emergency to control them or are they governed by law? I am a Representative of one of the original States, and I stand by the terms of the Covenant, not by the letter, but by the logic and the spirit of the charter. I say, put into execution every delegated power when the necessity arises for its exercise, but not if I can prevent it shall the instrument be perverted and new powers that do not belong there incorporated in its provisions. We want the Constitution to stand as it is; and if it is to be amended, to have the change made in accordance with the methods that it provides. I will not say that the Republican party, in its entirety, stands for any different process, because there are many members of that party who agree with us upon this subject, but I do unhesitatingly say that a new school of revisionists has arisen in the land, which is undermining the fabric and shaking the pillars of the temple. They want the Covenant broken. Call them what you will, Federalists or Nationalists, they are the apostles

of destruction. They are gathering their disciples principally from the ranks of those who do not understand the philosophy of our institutions. Every act of Executive usurpation meets with their approval, and every attempt to curtail the liberty of the States has their sanction and indorsement.

I am here to oppose to the last degree this new doctrine of Federal centralization. We are fully capable in the States of managing our own affairs in accordance with our traditions and our usages and our customs. We do not want the jurisdiction of the Federal courts enlarged unless demanded by the necessities of the case, nor our State Courts interfered with in the administration of justice. We do not want any unnecessary embargo laid upon our legitimate commerce, nor our State charters subjected to Federal forfeiture. We protest in unmeasured terms against the presence of Federal inspectors and deputy marshals and supervisors in the business establishments of our States. We deny the right of the General Government to dictate the kind of labor that we shall employ in our manufacturing establishments. We stand upon our rights under the tenth amendment to the Constitution. This tenth amendment has added nothing whatever to the rights of the States, as they existed before its adoption. The rights of these States, outside of the delegated powers, would have existed with equal force if this amendment had never been framed. Its only purpose was out of extreme caution to emphasize the proposition that they should not be intruded upon.

I have stated now my Democracy. I do not believe that our party can be born again. It is either a States' rights party, under the present acceptation of that term, or it is nothing. It will never come into power as an annex of the Republican party. If it changes its historic principles, it must change its historic name. It can not accept the new revelation and cling to its ancient title. The moment it parts with its heirloom and its birthright, it disintegrates.

The Democratic party today is in favor of the exercise of Federal power wherever it exists and whenever it is necessary to bring it into operation. Whenever the emergency of the Union demands it, we shall answer with loyal hearts the summons of the Constitution and maintain and defend it. Whenever the welfare of all the States demands the exercise of the delegated powers, we resolutely believe in bringing them into play. We do not, and we shall not, and we can not, believe in perverting the delegated powers of the Federal Government. We deny, as a party, the right of Congress, or the Executive, or the courts, to misconstrue them and enlarge them beyond the intent and spirit of the instrument. However much it may regale the body politic, and whatever new vitality it may infuse into its organs, we reject the application and shall not put the chalice to our lips. If this is not Democracy, then I know not what I am. I am here in strict obedience to the Constitution. I have sworn to support it, and every clause and line of it commands my fealty and allegiance. I have not sworn, and I never will swear, until I become an apostate from the altars of my political faith, to support that which is not in the Constitution and that which was never intended to be placed there.

I have been asked in this connection : "What will be the platform of your party at the next convention?" I can not tell. If I had a hand in its construction, it would be a Democratic platform. It would ring with the martial music of the ancient lays. I would not hang our harp on a willow tree. As a rule, people do not read platforms, and those who read them do not believe them. I would give them something new, but that which is new is something old. I would reanimate the Constitution, which has been disfigured and defaced, and try to infuse into the minds of the people the philosophy of our institutions.

I would undoubtedly continue our historic contest against a tariff levied for protection. I do not believe that the present

system should be reformed by its friends. I believe it should be reformed by its enemies.

I would agree that this Government should become a world power upon the field of commerce and of enterprise and of civilization, but I would reject every proposal to unite with any other robber government in the despoilment of foreign territory or in the conquest of helpless races.

I would, with no uncertain sound, declare against Executive usurpation, and would again announce the doctrine settled nearly a century ago in this body, that this is not an Executive Government, and that the President, in the exercise of his functions, must be guided by the specifications of the instrument that creates them.

I would unhesitatingly announce that the Democratic party is in favor of the enforcement of every Federal enactment upon the statute book, and the greater the criminal who violates it the more severe should be the penalties that are to be visited upon him, and that the law should be put in force against every industrial monopoly that is throttling competition and plundering the home of the American consumer.

I would limit the Presidential office to a single term, and would further proclaim that no President should have the right to determine the selection of his successor through the use of Federal patronage.

Above everything else, however, I would add a plank declaring that there is no such thing as an unwritten Constitution of the United States; that it is a treasonable act to insert into it, whether by judicial construction or otherwise, any power or grant that is not contained within the limitations of the instrument; that no Commonwealth of the Union should be interfered with in the exercise of its sovereign functions within its own jurisdiction, and that the guaranty of the tenth amendment, so long as the integrity of our Government is maintained,

must stand inviolate and unprofaned. I know it is claimed that the people are in favor of a strong centralized Government and of an Executive with imperial prerogative. It is also claimed that the contest will be lost if we insist upon maintaining the rights of the States or weakening the power of the President, and that we ought to abandon the question of constitutional rights and accept the new revelation that has been vouchsafed to us under the present Administration. We are told that the men who made the Constitution did not comprehend what it meant; that the President is the oracle who has relieved it of its mysteries and unfolded its true interpretation, and we are admonished that inasmuch as he has been praised and commended by prominent leaders of our party that his version of the Constitution has been approved, and that we ought to hail him as our prophet and deliverer. This is a transcendent position for the Democratic party to occupy. Speaking for myself, I regret that I can not accept his Messiahship, and I respectfully raise the standard of revolt.

The trouble with the President is—and I always speak of him not only deferentially, but with great personal respect—that he regards himself as vested with unlimited executive power under the Constitution. I presented this aspect of the subject in full to the Senate at the last session, and if I ever demonstrated anything in my life, I think that I satisfied the Senate on that occasion that the article in the Constitution that vests executive power in the President is simply a distribution, and not a grant of power, and that the grant lies entirely in the specifications of the instrument. The President evidently does not agree with me, nor does he agree with any one of that distinguished group of statesmen who, in the early days of the Republic in this body, resolutely and successfully maintained the same ground. He believes, in the language of one of his panegyrists, whom I quoted literally in the address that I refer to, that his executive powers are unqualified,

plenary, and unlimited. Notwithstanding the attitude of the President in reference to his constitutional prerogative, which is at utter war with every Democratic principle and tradition, an attempt has been made within our party to place us in a situation upon this subject which is almost inextricable. Some of our prominent leaders, with unrestrained exultation, have applauded the President to the echo, and in unmeasured terms have commended his revised edition of the Constitution of the United States. A wild and frantic hosanna lately pealed forth in an adjoining Chamber from Democratic bosoms, as a message, replete with the assumption of unlawful executive authority, resounded through the Hall.

In view of this complication, I would like an answer to this question, and, perhaps, some one can enlighten me upon it. If the President should be nominated by the next Republican convention, what will our spokesmen and orators say who have become the disciples of his creed and in worshipful idolatry have bowed at his shrine? A distinguished Southern editor some time since tried to help us out of our difficulty and solve the distressing problem by suggesting that the Democratic party ought to anticipate the convention of the Republican party, and by force tear away the President from his own party and nominate him as our candidate. If the Democratic party had availed itself of this advice and nominated the President as its candidate, and the Republican party had afterwards assembled in convention and torn him again away from the Democratic party and also nominated him as its candidate, I would have been placed in the most embarrassing situation that anyone could possibly occupy. I do not know what I would have done under such circumstances. I would have felt like exclaiming, "The Republican party has given; the Republican party has taken away; blessed! blessed! be the name of the Republican party!"

In view of the dilemma that confronts us, I feel that in

speaking here today upon the subject of States' rights, I can only speak for myself, and that I have no right to bind my party to any utterance that I have made. And thus speaking for myself alone, I desire now to say that so far as I am concerned I do not want anyone to tell me, not even a Republican President, what the Constitution means. If I want to find out its meaning, I will go to the men who framed it, and not to the men who are paraphrasing and translating it. I will examine the pages of the Federalist.

I will consult with Marshall, and with Taney, and with the Supreme Court that for the hundredth time in its last announcement, speaking through Justice Brewer in Kansas against Colorado, again proclaimed that this is a Government of delegated powers, and that no invasion must be tolerated upon the reserved rights of sovereign States acting within their own jurisdiction. I know that Democrats in prominent places are clamoring for implied powers and for enlarged construction. I will admit that the Constitution is not perfect, but with all of its imperfections, I say, let it stand. I have not seen anyone yet whom I would trust to improve upon the work of Hamilton, of Franklin, of Patterson and Wilson, of Randolph and Madison, of Martin and of Mason, of Rutledge and of Pinckney.

I have always looked upon the Democratic party as the sentinel of the Constitution, and as a party man I protest against its being tampered with by scribes and mountebanks. I believe that in the coming contest we ought to plant our colors upon the tenth amendment, and make the contest clear and clean between the reserved rights of the States upon the one hand, and Federalism and centralization on the other. It is predicted that if we adopt this course that we will lose. Very well, Mr. President, so far as I am concerned, I would rather lose and go down to defeat than purchase victory at the sacrifice of principle. We have been defeated over and over again, but we have never yet, in all our history, sounded a final

and an ultimate retreat. To accept these heresies now is a cowardly surrender at the post of duty.

I want it known that we can never take this step unless we do it voluntarily. If we become the party of the Federal Government as against the rights of the States, if we are to fill our platform with the creed of the propagandist, if this is our new role, and we are to abjectly abandon everything that we have stood for in the past and venture into this foreign field and partake of this forbidden fruit, then when history recounts the tragic manner of our death as a political party, I want posterity also to know that in the hour of our brightest hopes and most alluring prospects, determined to end our great historic career, that of our own free will and choice we threw ourselves upon the poisoned weapon of Federal centralization and died of a self-inflicted wound.

ADDRESS UPON THE DEATH OF SENATOR WILLIAM PINCKNEY WHYTE.

Eulogies were pronounced upon the life and public services of Maryland's Grand Old Man in the Senate January 16, 1909. He was at three different periods a member of that body, an historic fact not true of any other Maryland statesman.

We are here today to pay the last tribute to the memory of our departed colleague, the Hon. William Pinckney Whyte, Senator from Maryland.

The word "honorable" has had a varied signification in the political nomenclature of this country. It often has no meaning, and is frequently attached to names that have very little claim to its title. In his case it has a double signification. His life was full of honors, conferred upon him by the people of his State, and as he bore them successively, his public and private career was as honorable in all of its acts and deeds as that of

any man who ever served his people in the history of this country.

Senator WHYTE was a remarkable man in point of character and ability, and certainly not in my days, has our State ever produced anyone who had so firm a hold upon popular confidence and affection. In fact, looking over the history of Maryland, I can safely say, taking his record as a unit—at the bar, and at the various professional employments that he filled, and the high places that he honored and in the universal esteem that he was held by our people for over half a century—I know of no one who occupied a higher or more distinguished position than he did in the annals of our State.

Coming from a distinguished ancestry, of which fact he was never known to boast and never even allude to, the representative of an illustrious and honored lineage that was the pride of Maryland in its earlier days and that will continue to reflect glory upon her in all the years to come, it might be supposed that such a descent and such an environment became his easy passports to favor when he entered upon the public career that he had planned for himself in the pursuit of an honorable ambition. This was not the case. He seemed to throw off at the very outset of his career every help and claim that such an influence might be supposed to give and to practically proclaim to the people that he desired nothing from their hands except that which his merits entitled him. He had made up his mind at an early age to work by honest toil from the bottom round of the ladder to the top, if possible, and never to depend in the slightest degree upon any extraneous influence to lift him into places that his qualifications did not entitle him to hold.

He filled so many posts of honor with such lasting credit, that it would be almost impossible to sketch in this brief presentation the history of all that he did and the great and arduous work that he accomplished. It is sufficient to say that he was either elected or appointed to every office that the State

of Maryland could give him and which he was willing to accept.

He had a business, a professional and a political training combined. Commencing his active life in one of the largest commercial houses in America, he acquired an experience and knowledge that were of invaluable service to him afterwards in his profession, and that for years gave him a reputation in certain of its departments unsurpassed by any of his brethren at the bar. In commercial practice, when it became necessary to investigate in detail the accuracy of complicated accounts, he was the most marvelous hand at our bar to unravel and explain them and to discover the slightest mistake or inaccurate entries that they contained.

I remember once an important case in which I was associated with him, in which a large amount of money was involved, embracing partnership settlements that had run over a long period of years, upon which the auditor of one of our courts, himself an expert accountant, had stated an account and certified its accuracy to the court, and which Senator WMYTE had set aside through the discovery of an error in bookkeeping that had not occurred to any one of the numerous counsel who were connected with the case.

When it came to the trial of cases before juries, civil and criminal, when he was at the height of his practice, he stood without a peer. For years and years he was the leading counsel in almost every great criminal case that was tried in our courts, and his success was so wonderful that it would sound like fiction if I were to attempt to recapitulate the verdicts that he secured and the victories that he won. In his palmy days upon the hustings he was incomparable. As has been well said by my colleague, with a commanding presence, with a captivating voice, with ready wit, and a memory for events and individual recollections that seemed to grow stronger as he

advanced in years, Senator WHYTE held hundreds of audiences spellbound by the charm and magic of his eloquence.

A man may possess all of these great gifts and still not be personally popular with the masses. This was not his case, however. He was the idol of his fellow-citizens, because he was always easy of approach, never exclusive in the slightest degree, and at all times willing to place himself upon a par with the humblest of his constituents with whom he came in contact.

He possessed another gift that was with him until his death. He had the greatest capacity for untiring and systematic work of anyone whom I ever knew. For years and years I saw him almost daily, but I never saw him disengaged or idle. He was always at work on something. And during almost the whole of the time he held public office, with the exception perhaps of the period during which he was Governor of the State, he never relinquished his professional work, but carried it right along, accomplishing the rare feat of being able to bestow his attention upon his practice and at the same time faithfully and assiduously perform the great public trusts that had been committed to him. And, Mr. President, he did loyally perform them. No matter how minute the detail, how tiresome the inquiry, or how laborious the examination, no subject was ever committed to his charge to which he did not devote the concentrated powers of his great intellect.

He filled the office of Comptroller of the State of Maryland; he was Governor of the State; he held important posts as legal advisor for the municipality of Baltimore; he was Mayor of the city; he was Attorney-General of Maryland; and three times a member of this body—once to fill the unexpired term of Reverdy Johnson by appointment, second by election of the general assembly, and third by appointment of Governor Warfield to fill the unexpired term of Senator Gorman.

During the whole of his political career, he was the type and representative of a generation of constitutional Democrats, who have shed imperishable luster and renown upon the history of their country. He believed in the Constitution of his country as it was written and intended, and not as it has been perverted and disfigured. He was not what we may designate a strict constructionist of its provisions, because he always believed in putting into exercise the powers of the Federal Government whenever the emergency demanded it. He was, however, irrevocably opposed to conferring upon the Federal Government powers that were never intended it should possess. And, so far as the rights of the States were concerned, he stood here in this body and elsewhere as a sentinel upon the watchtower, to protect them from invasion by sounding the alarm whenever an assault was attempted upon their institutions. In this political faith he lived, and in it he died.

There is but one Senator here now who was with him in those stormy and memorable days, the senior Senator from Colorado [MR. TELLER], whose voluntary absence from this body we shall all lament in the years to come. Beyond the Senate, however, the people of Maryland and the Democracy of the Union will never forget the services that Senator WHITE rendered in their behalf. If Democracy means anything at all, he illustrated it in its truest sense. Time and time again he lifted his voice in this Chamber without avail against political tyranny and oppression, and time and time again he thundered through this hall the discarded warnings of the Constitution. His last effort in the Senate, when his clarion voice rang as it did in the days of yore, was upon the reserved rights of sovereign States. He pointed to the fact that the States were still sovereign when they acted within their own jurisdiction, and that no emergency justified a violation of their constitutional prerogative or a breach of their inherent rights. Inherent rights of the States and not inherent rights

of the Union was the precept of the creed at whose altars he worshiped. He threw aside with lofty disdain the vain conceit of an unwritten constitution which is bewildering the minds of some of our modern statesmen.

He stood upon this basic principle of a constitution with delegated and enumerated powers; and in so far as he was concerned, the billows of political opposition and adversity beat in vain against the bulwark he had reared. His political record affords an example worthy of the profoundest study and the closest emulation. Men like him, Mr. President, do not perish; they perish from the face of the earth, but they live upon the pages of immortality. I mean not merely that their names are honored and their deeds remembered, but that the impression that they have made is indelibly stamped upon the course of history. Their work becomes so interwoven with the spheres of action in which they labor that long after their departure the creation of their minds, even if not written upon the page of history, stamps itself imperishably upon succeeding generations. If the night of forgetfulness and decadence should ever overtake us in our political wanderings, names like his should light and lure us back to the paths of honor and of duty, as they flash and sparkle on the firmament.

It must not be inferred, however, Mr. President, from anything I have said that his political career was a placid one. Calmness and tranquillity were not the usual accompaniments of political contests when he led us on to battle in Maryland. Those were days of tumult and contention, when bitter charges were made, and feelings were inflamed, but through it all no one ever attacked the honor of the man. Let it be written down that no personal charge of opprobrium or of dishonor was ever brought against him by his most malignant foe. In one of these contests he fought almost single-handed. There was opposed to him an array of brilliant talent, comprising the flower of the Maryland bar, the foremost men upon the

forum's field. A compromise was suggested before the lists were closed, but he refused to yield.

He was of heroic mold and whether it be right or wrong, there was one political virtue in which he always gloried, and that was his gratitude to his friends. He did not belong to the school of statesmen who believe in using men to further their ambition and then sacrifice them when the occasion demanded it. He was not a theorist or an ingrate in politics, but his blood was warm for those who served him. In this contest he was the center of the storm and the shining mark of the enemy, and he went down to defeat. Defeat did not dismay him and reverses did not intimidate him; and while his friends were still mourning over the disaster, he sprang unsullied back again to the hearts and confidence of the people, and there was no honor with which they could have endowed him that was not at his disposal.

I will not dwell upon the surroundings of his home. He possessed the deepest devotion for his family; and while he never had any ambition to accumulate a large fortune, he was always solicitous for those around him and seemed to be perfectly satisfied if he was able to provide for them every comfort and indulgence they desired. In his own habits he was abstemious to a degree of absolute forbearance, and he pursued a life of self-denial and sacrifice that is rarely to be met with. There was something exquisite about the love he bore to those who were dear to him and the tender and touching care that he bestowed upon them. I was with him at one of the saddest scenes of his life, when his heart was rent in twain with grief and sorrow. I can never forget the way he bore his affliction. It was not the callous philosophy of stoicism. It was an absolute resignation and submission with a spirit of sublime fortitude to the Divine will that left an impression upon me that I can never erase and that has often made me feel that of all his virtues I would rather possess this one, so

that, imitating him when the shades of night are gathering around my fireside, my spirit could arise above the gloom and behold in its dying embers the reflected vision of a reunited home.

His was the philosophy of faith that never permitted him to question the great truths that are alone worth living and struggling and dying for, and without which human life would only culminate in despair. These truths were axiomatic with him. He never discussed them or allowed himself to doubt them, and he passed upon his journey to the shoreless sea with an unerring confidence in their realization that no reasoning could shake and no visitation of Providence could impair; and without which belief, human life would be but the involuntary outcome of a cruel fate, absolutely purposeless and meaningless, with not one ray of Divine love to illumine the impenetrable mystery.

Upon one occasion a great philosopher said to a great scientist:

Your belief in a personal creator and in a future state is at war with your profession; it is all a myth and a fable, and you can not reconcile one with the other.

The answer came:

Well, even if it be a fable, which I do not believe, it has led me to a better and a purer life. I cherish the ambition that this fable shall be my dying dream, and I will follow it to the grave.

Governor WHYTE in his religious belief was a man of the deepest devotion and the most profound convictions. While as a statesman he worshiped the cardinal principles of the Constitution, he, as a firm believer in the responsibility of man to God, followed with unfaltering footsteps to his end the cardinal principles of his faith and his church. In every step of his illustrious career there predominated that which is greater than anything he ever did, and that was his unyielding spirit of honor and integrity, which, with the great moral purpose that per-

vaded his life, enabled him to resist every possible temptation to swerve from the path of duty. He was honest to such a point of delicacy and refinement in his professional intercourse with his clients that he hardly ever placed a proper estimate upon the valued services that he performed for them, and in his public life no one would ever have dared by any form of allurements, even in the remotest degree, to attempt to influence him in the discharge of his public functions.

Thus he lived and thus he died. With us his place will not be filled in the present day at least. It would be difficult to emulate or imitate him, because Providence had given him a combination of virtues and of talents that rarely work in harmony with each other. He needs no monument to commemorate his life. In due time, however, I suppose our State will erect some memento in grateful acknowledgment of his services in her behalf. Such a testimonial, while it would perpetuate his memory, is not necessary to elevate him in the respect or esteem in which he was held by the community among whom he passed his days. His life needs no legend or inscription to adorn it. He has built his own memorial. He has written upon the "eternal skies" the record of a stainless name.

OBSERVATIONS UPON THE TARIFF.

In this address, delivered May 31, 1909, Senator Rayner took note of the disorganization of the tariff forces of the Senate by the militant insurgents, and predicted the downfall of the "citadel of protection."

My remarks will take about twenty-seven minutes. One-half of this time will be devoted to a brief narrative which I know will be entirely harmless and inoffensive. The balance of the twenty-seven minutes will be occupied with matters a little more grave and serious.

I propose to make a few observations upon the citadel of protection. The other day the Senator from Rhode Island, when a great speech had been delivered attacking the rates of duty in the woolen and cotton schedules, remarked that to change those schedules would destroy the very citadel of protection.

I want to look inside of this citadel now for a moment and see what things are going on from day to day. Never in my experience was a citadel in such a state of tumult and commotion. The Senator from Rhode Island is upon the upper floor, and with him are his warriors. The din and clatter are on the floors beneath. I was gazing at the classic features of the senior Senator from Massachusetts the other day when there was the usual uproar in the citadel. The sturdy recruit from Kansas was hammering away at the lead schedule, and it seemed to disturb the tranquillity and repose of the senior Senator from Massachusetts. He appeared to be almost upon the point of prostration and collapse, when the senior Senator from New Hampshire, who is the surgeon of the post and is always ready with his remedies and nostrums, arose to administer a stimulant to the Senator from Massachusetts, who quickly revived under its exhilarating effect.

I observed upon another day, when everything seemed serene upon the upper floor, that suddenly the nerves of the senior Senator from Rhode Island became distracted while that sturdy old revolter, the senior Senator from Minnesota, who has admitted that the blood of Scandinavian pirates is in his veins, and who is upon the ground floor, commenced to scuttle the citadel, if I may use that word in connection with a citadel, by driving with his sledgehammer blows, large holes into the bottom of the structure. When the muster roll was called, however, and the vote was taken, the damage was repaired, and the Senator from Rhode Island, upon the upper floor, resumed his ancient smile.

Upon another day a volunteer from South Dakota, who is also upon one of the lower floors engaged in dismantling the citadel, began to tear away the iron girders that support the fabric, and the Senator from Rhode Island cast a furtive glance toward the Senators from Michigan. These sturdy stalwarts reassured him that if he would keep his courage up they would guarantee that the iron mines of Michigan would furnish sufficient raw material to underpin the structure for the next six thousand years, and on this floor a compromise was struck and fifteen hundred years was determined upon as the time limit within which all the ores from all the world should be excluded from our shores.

Then there arose the great insurgent from Wisconsin, as mild a mannered man as ever cut a throat or scuttled a ship. He is also in the citadel. He is underneath the structure all alone, plodding by day and dreaming by night how to undermine its foundations, so that the entire citadel will tremble from its turret to its base. He arose to make some innocent suggestions in his usual modest and persuasive way, and while they were made in almost whispering accents, they rang through every floor of the citadel like discordant notes of music on the structural clauses of the metal schedule. The Senator from Rhode Island heard them, and then a scene transpired that I shall long remember. The great ex-Secretary of State, whose presence is an honor to this body and who has filled with such high distinction every service into which his country has called him, was figuring and writing. The Senator seems to be always figuring and writing. The Senator from Rhode Island was looking toward him. Now, it must be understood that the Senator from New York is not within the citadel. He has a little citadel of his own, and between his citadel and the main stronghold, upon the upper floor of which his client, the Senator from Rhode Island, is located, there is a wireless system of telegraphy. Whenever the Senator from Rhode Island is

in imminent danger and peril there comes a hieroglyphic message from the Senator from New York—"Hold the fort, for I am coming." In this instance there came upon the waves a message that startled and electrified the Senate. It was to this effect and, when deciphered, it read in substantially these appalling words:

Mr. President—

Said the Senator from New York—

the Senate has been laboring under a delusion in holding the Senator from Rhode Island responsible for this bill. He is not guilty, except as to the portion in italics. The bill embraces over two hundred pages, and I shall prove to the point of demonstration that he is not guilty as to anything except the type that slopes toward the right, a species of type that is called "italics" because in the year 1500 it was dedicated by its founder and inventor, Aldus Manutius, to the states of Italy. I can prove an alibi for him upon every line of the Roman lettering of the entire instrument. Not only can I prove an alibi, but I will produce before this body the actual criminal. The unfortunate criminal, Mr. President, in whose behalf I beg the tenderest mercy of this tribunal, is the gentleman who presides over the Ways and Means Committee of the House of Representatives. He composed every line of the Roman lettering, and the Senator from Rhode Island is innocent.

This deliverance reminded me of an incident that occurred in one of the judicial tribunals of my own State. A prisoner was on trial for crime. He was acquitted upon proof of an alibi. When the case was over the judge who presided at the trial approached the prisoner's counsel and said: "My friend, that was a good alibi that you proved in this case." "Yes, your honor," said the prisoner's counsel, "I had a large number of alibis handed me and I selected this one because it was the best of the lot."

Is it any wonder that when the Senator from Rhode Island was thus acquitted a joyous smile suffused not only his genial countenance, but the countenances of all of his relatives and kindred upon the Committee on Finance? Even the Senator from California, who is one of the next of kin of the Senator

from Rhode Island upon the committee, rejoiced because the acquittal of the chief conspirator, under the ingenious plea of the Senator from New York, carried with it necessarily the acquittal of the Senator from California, because there is scarcely a product of the California orchards and vineyards that does not blossom and bloom under the Roman lettering of the tariff bill, and a quarter of a cent upon lemons is the only count in the entire indictment, it being in italics, upon which the Senator from California could possibly be convicted.

When I say that the Senator from New York was constantly figuring and writing, it is proper for me to state that he is not the only Senator who is thus at work. The brilliant senior Senator from Indiana seems to be engaged continuously at the same sort of labor. I must confess I have not any definite idea what the Senator from Indiana, with all these enormous tariff schedules upon his desk, is figuring and writing about all the time. I do not know whether he is in the citadel trying to get out, or whether he is outside of the citadel trying to get in. He seems to be on the friendliest economical footing with the Senator from Rhode Island, because whenever a schedule is reached the two Senators seem to be embracing each other; and then, a moment afterwards, the Senator from Indiana arises to shake his gory locks at the Senator from Rhode Island. I will not call this a seance, because I want to be polite. But what is it? Is it a comedy or tragedy, for we know that the world is a stage and all of its people actors?

The greatest act, however—and when I call it an act I do not mean for a moment that it was not perfectly sincere and genuine—that has been played during all these scenes, either inside or outside of the citadel, was that performed by the radiant mutineer from Iowa, the senior Senator from Iowa. I have seen the Senate and the House held for hours upon great constitutional and governmental questions by men of eloquence and power, but any man who can throw his emotions into the

woolen and cotton schedules and captivate the Senate for two days by the charms of his oratory and the sparkling humor of his repartee, deserves the admiration of posterity. It was a great and dazzling feat that the Senator from Iowa undertook. It was an intellectual athletic achievement that has hardly ever been equaled upon the floor of this Chamber. The Senator measured the citadel and made up his mind that he would ascend to the top of it while the shot and shell were pouring in upon him from its upper apartment. He did it well. Round by round he climbed. His eye was on the summit, and he never stopped until he stood beside the spire. One hand upon the flagstaff, with the other he seized the flag and took its protected bunting and tore it into shreds and tatters.

Upon the first day of the charge he was frequently interrupted by the senior Senator from Utah. The Senator from Utah is the chaplain of the garrison and is holding daily his morning, midday and afternoon revivals. He is not only the chaplain of the garrison, but he is the spiritual adviser and comforter of the Senator from Rhode Island. This is perfectly right and proper, because the Senator from Rhode Island in his moments of remorse and penitence for the work that he is engaged in is entitled to all the assuaging consolation that religion can afford him. Upon the second day the Senator from Utah ceased his invocations. He had evidently arrived at the conclusion that the heretic from Iowa was not a subject for conversion. Not only this, but the Senator from Utah had probably consulted certain passages of the Scriptures which had admonished him that the power of silence at certain psychological moments is one of the greatest gifts of God. I will give these biblical quotations.

Fourth chapter of First Corinthians, verse 20:

For the kingdom of God is not in word, but in power.

The Epistle of Paul to the Hebrews, chapter 4, verse 2 :

For unto us was the gospel preached, as well as unto them ; but the word preached did not profit them, not being mixed with faith in them that heard it.

The second Chapter of Job, verse 13 :

So they sat down with him upon the ground seven days and seven nights and none spake a word unto him, for they saw that his grief was very great.

When I speak of the Senator from Utah as the chaplain of the garrison, I must not omit the fact that the senior Senator from Montana is the bishop of the entire flock. He does not hesitate, however, when the theologians who are under him are absent upon their pastoral calls to step down from his high elevation and occupy the place of moderator of the assembly and superintendent of the Sunday school upon the other side of the Chamber. The senior Senator from Montana is the great pacifier of his party. There is no hole so narrow or so deep that any of his colleagues can get into that he can not crawl in after them and bring them back to the surface. There is no complexity or difficulty so great that he can not relieve the situation.

We had as fine an example of this as I ever witnessed upon this floor a few days ago. The sugar schedule was under discussion, and the junior Senator from Kansas was pounding and hammering away at the citadel, and I thought that at last there was a chance, perhaps, of making some inroad upon it. All at once I saw the benignant countenance of the senior Senator from Montana at the further end of the Chamber, as I thought, engaged in silent prayer. Gradually he wound his way around to the middle aisle. How he got there I do not know. His chaplain, or one of his chaplains, the senior Senator from Utah, was in great peril, and he had come around to extricate him. It appeared that the Senator from Kansas had received a communication from a Cabinet officer in connection

with the sugar schedule, and the Senator from Utah, a few days afterwards, had received a communication which absolutely contradicted the first communication that the Senator from Kansas had received, and thereafter, the junior Senator from Georgia also received a communication from the same Cabinet officer contradicting both of the other communications that had been sent to the Senator from Kansas and the Senator from Utah. Now, a complicated and intricate situation of this sort would have deterred almost anyone in any effort or attempt to settle it. Not so with the Senator from Montana. With the serenity and composure of a saint, he stepped into the breach and, waving all three Senators aside, he said :

Mr. President, if these Senators, who seem to be considerably agitated in this matter, will hold their peace for a moment, I think I can solve the situation very easily. If a man makes a statement one day—

Said the Senator from Montana—

and then upon another day makes another statement at entire variance with the first, and then upon another day makes a third statement in deadly conflict with both of the other statements that he has made, there is a way, Mr. President, by which all of these statements can be reconciled without imperiling the truth of any of them. In such a case—

Said the Senator from Montana—

in order to arrive at the truth I would take the three statements and strike an average, and thus by a process of mathematical adjustment I would maintain proper proportions and arrive at a symmetrical and harmonious solution of these three apparently irreconcilable positions.

The most remarkable thing in connection with this statement was that every one of us seemed to be perfectly satisfied with this process and explanation. And after the Senator from Montana had pronounced this benediction he retired with that guileless and immaculate expression that would have done credit to the meek and lowly Moses when he came down from the smoking mountain with the tables of testimony in his hand.

Now, Mr. President, this description that I have given would not be worth the consumption of the time that the narrative

has taken if it did not have a moral to it. What is the moral? This is the moral: The Senator from Nevada, a man of great learning and accomplishments and replete with original ideas and conceptions, the other day, after the junior Senator from West Virginia, with his hand upon a decanter, had concluded an oration, whose purpose it was to show the poverty and destitution of the American manufacturer and the unbounded wealth and opulence of the American retailer, suggested that the proper step for us to take—that is, those of us who are playing around the breastworks—is to form a combination with those who are inside the citadel, and thus by a union of forces destroy the edifice.

This plan did not strike me with much favor when it was proposed, because, as a rule, I do not believe in political combinations of this sort. Whatever impression it made upon me, however, was entirely dispelled when the junior Senator from Iowa arose to make his dashing onset upon the citadel. I had cherished the idea that the junior Senator from Iowa intended to dynamite the entire establishment. By frequent intimations he gave notice of that sinister purpose. As a rule, dynamiters do not herald their intentions, but there are some exceptions to the rule, and knowing the junior Senator from Iowa to be a gladiator of great valor and prowess, I took him at his word. But, Mr. President, there was no dynamite in sight. The Senator had no explosives with him. He simply had a shovel, a pickax, and a crowbar, and was trying to weaken some of the schedules so as to send a few rafters and shingles and splinters through the circumambient air. And when he finished with his tools he boldly announced that after the whole business was over he would gladly take his place upon the upper floor with the senior Senator from Rhode Island if some one would kindly lift him up by a derrick to this high eminence and exalted station.

Now, how can there possibly be a combination between us on

the outside and the insurgents on the inside? I have never believed and never will, so long as I maintain my faculties of reasoning, that Congress has any right under the taxing power to lay prohibitive duties. They believe we have, and their idea is when they strike down certain schedules, to maintain the great principles of the bill, and I am against the principle of the bill. Let me tell you, the Supreme Court has never decided this question, and the best text-writers and commentators are against it. Understand me now, so that there is no mistake about it. I maintain the proposition that if this act were to declare upon its face that any of the duties which it imposes are prohibitive and that they are levied with that intent, the act would be unconstitutional *pro tanto*. Do not let us get confused now upon this proposition. I do not hold for an instant that a protective duty levied upon a revenue basis is unconstitutional. That question has been closed by the decisions, but I assert, without the fear of successful contradiction, that if the act shows that we are imposing duties that we do not intend to receive and providing for revenue that we do not intend to collect, and if that purpose is manifest upon the face of the legislation, such an enactment would be unconstitutional.

I do not care to discuss this proposition with anyone who skims along the surface of great legal problems, but I would be glad to argue it with anyone who is thoroughly conversant and familiar with the principles and authorities upon the subject. I know that I will be asked, "Do you mean to say that a protective duty is unconstitutional?" No. I mean to assert no such absurdity. I admit that if a duty for revenue is laid, even if it affords protection, while it might be against public policy and the traditions of my party, it is a valid exercise of constitutional power. My proposition is this: When you show that the duty is levied not for the purpose of revenue, but for the purpose of absolutely preventing importations, then under the taxing power you are beyond the jurisdiction

of the Constitution. Do not tell me that I am reviving an obsolete doctrine, because I tell you that the point that I am now making has never yet been presented to the courts, and the courts have always avoided deciding it, because the legislation before them has always concealed the intent of the law-making power. The courts have always said they could not tell whether or not the act will raise revenue, because upon its face it purports to do so. They have never yet been called upon to deal with an act which upon its face, while imposing a duty, demonstrates that it did not propose to collect any revenue. I do not believe there is a lawyer in this body thoroughly conversant with the principles of constitutional law who will dispute the proposition for which I am now contending.

I send now to the desk a bill which I have drawn, which I desire to have read, and which illustrates the proposition for which I am contending. Of course, I have no idea of offering this bill, but I simply take it as an illustration of my argument.

The Vice-President—In the absence of objection, the Secretary will read as requested.

The Secretary read as follows:

Whereas it is proposed to place a duty upon steel rails that will prevent their importation into the United States, so that said duty shall be absolutely prohibitive and give the manufacturers of steel rails in the United States the entire control of the American market: Now, therefore, in order to carry out said purpose,

Be it enacted, etc., That on and after the day following the passage of this act there shall be levied and collected the sum of \$40 per ton upon all steel rails when imported from any foreign country into the United States.

Mr. President, does anyone here believe that this is a constitutional measure? Why not? Simply because upon its face it shows that, while professing to be a revenue measure, it is absolutely prohibitive upon importations, and that this was its object and design. Now, it will be asked me, "Is this pres-

ent bill unconstitutional?" Certainly not. Why not? Simply because we are perpetrating a fraud upon Congress, upon the Constitution, and upon the Supreme Court of the United States in concealing the legislative motive from the legislative measure. This bill, under the guise of collecting revenue, places a prohibitive duty upon hundreds of articles of importation, and if it expressed this purpose upon its face, as does the bill that I have sent to the desk to be read, it would be unquestionably pronounced invalid. It is for this reason, Mr. President, that I am against the entire bill, and against any bill that levies prohibitive duties.

I do not believe that either openly or in disguise we have any power whatever, under the taxing and revenue clauses of the Constitution, to place a prohibitive duty upon importations to protect the industries and manufactories of this country. This is the faith that I was born in, and this is the faith that I hope to die in, if the Constitution shall still survive at the period of my demise. And in order to show that this is the genuine creed of our institutions, I now read a few lines from authorities as great as any that exist upon the subject. These are the words. I read first from Tucker on the Constitution:

The power granted as a means of revenue can not be diverted from this legitimate purpose by the indirect use of it to do what Congress has no power to do by direct taxation. The end is not legitimate, and therefore the law is not constitutional. It is true that where the law merely imposes the tax without disclosing the indirect purpose of its imposition, the courts may have no right to declare the law unconstitutional, though if the purpose were disclosed on the face of the act the courts would do so.

And now again, quoting from Judge Cooley, I read the following extract:

Constitutionally a tax can have no other basis than the raising of revenue for public purposes, and whatever governmental exaction has not this basis is tyrannical and unlawful. A tax on imports, therefore, the purpose of which is not to raise revenue, but to discourage and indirectly to prohibit some particular import for the benefit of some home

manufacture, may well be questioned as being merely colorable and therefore not warranted by constitutional principles. As it is a duty from which revenue may be derived, the judicial power, where the motive of laying does not appear on the face of the act, can not condemn it as being unconstitutional; but it is none the less a violation of the Constitution by the legislator who knows its object and levies the duty from a motive not justified by the Constitution.

So far as I am concerned I am voting with the insurgents all the time. They are all men of unflinching courage, but there is no doubt about the fact that, with the single exception of the Senator from Wisconsin, we have not heard a positive statement as to the willingness of any one of them to vote against the bill when it is finally perfected. Every time we vote with them we are defeated. After we vote upon the last item they will expect us to support the whole bill, with all their amendments voted down, while I intend to vote against the bill even if the amendments had been adopted. My own judgment, therefore, is that we had better go it alone.

I am not after a schedule here and there, because that illustrates no principle. I am not in favor simply of weakening the citadel. I believe in storming it if we have the power. The senior Senator from Iowa has torn down the flag, but he has raised no other flag in its place. If we had the lead, I would march toward the citadel in which monopoly lies intrenched. I would help to tear the mask from those who have robbed us, and the truth should be revealed. I would trample upon the emblem that bore upon its face the strange device of a prohibitive tariff. And in its place I would raise aloft the ensign of a constitutional tariff for revenue, the armorial crest of the Democratic party, whose flaming symbol should proclaim to our countrymen that we are ready again to make the fight upon this issue. Twice before we made the fight against terrific odds, and twice before we won.

I stand for the unprotected people against protected monopoly. Not protection to American industries, but protection

to the American consumer ; that is the catchword that I would conjure with. I may be wrong, but I believe just as surely as I am addressing the Senate today, that if we maintain the courage of our convictions and cling to the traditions of our faith, when this oppressive bill is passed the hour will come when the citadel will be reached and the citadel will fall. As posterity marches by its ruins and its dying embers, it will read the message that the garrison has capitulated, that the perverted and disfigured editions of the Constitution have gone down in the wreck, but that the scroll of the ancient law has been rescued, that the power to levy taxes upon the people of this country for any other purpose except governmental revenue has been forever repudiated, that the wants of penury and the toil of unrequited labor have at last been heard in the assertion of their natural and human rights, that the *magna charta* of the American consumer, containing his ancient and inherent privileges, has been restored to him, and that the partnership between the protected interests, which for nearly a half century have been gathering their toll at the ports of entry of this Republic, and the Government of the United States has been forever sundered and dissolved.

INCOME TAX AMENDMENT TO THE CONSTITUTION.

In his discussion of this levy, Senator Rayner, on July 2, 1909, insisted that the proposed amendment provided for an excise tax, for a uniform tax, and that it did not, therefore, infringe upon the reserved rights of the States.

I kindly ask the attention of the Senate to discuss the legal phases of this amendment.

I want to say that I am in favor of the income tax, and I shall vote for the income tax if I have the opportunity of doing so. I may not have the opportunity of doing so, however.

I may be forced ultimately to decide whether I shall vote for this corporation tax or not. If I am forced to that ultimate decision, I shall vote for it.

I want to be distinctly understood upon this proposition. Between an income tax and a corporation tax, I am decidedly in favor of an income tax, for reasons that have already been given by Senators, and I do not desire to add anything to the literature on that subject. But if ultimately I am either compelled to vote for the amendment of the committee or to vote for no additional tax at all, I shall vote for the corporation tax. I rise now for the purpose of explaining my vote and justifying it.

I believe that this is a constitutional measure, and I hope that I shall be able to demonstrate that proposition. I do not care for words, Mr. President. I think if you will eliminate the sentence that the Senator from Connecticut desires to have eliminated you will make the law invalid. Not that I believe for a moment that a law can be made constitutional by legislation, but a law can certainly be made invalid by leaving something out of it.

I will state my propositions, and I will indulge in no irrelevant or collateral matter. I will come right to the point of the discussion. I lay down these three propositions: First, that this tax is an excise tax. That is the first proposition. The second proposition is that it is a uniform tax. The third proposition is that it does not infringe upon the reserved rights of the States.

The first proposition is that this is an excise tax. There can not be any doubt upon that proposition. No matter how this bill is worded, the word "or" or the word "and" can not change the construction of what this proposed law is. It is an excise tax. It is an excise tax and not laid upon the profits of a corporation. If it was a tax laid upon the net

profits of a corporation, it might possibly come within the income-tax decision. It is a tax laid upon the business and privileges of a corporation, and the measure of the tax is the net profits of the corporation. That is about as concisely stated as I can state it, and it has been so stated, not once, but a hundred times, in the different decisions upon kindred propositions. When we get away from that proposition we indulge in what seems irrelevant and collateral matter that does not even illuminate the proposition we are discussing.

Let us look at this and see whether I am right or not. I do not like the corporation amendment. I think it is inequitable. But when the time comes and we can not obtain an income tax, then I am in favor of this tax. I am in favor of an income tax upon the proposition advanced by the Senator from Texas and the Senator from Idaho and the Senator from Iowa, and other Senators. When the point is reached, I will vote for this corporation tax rather than vote for no tax, and that is the only ground on which I will vote for it. In voting for it I want to justify my vote on the ground that I believe it is a legal tax, and there will not be a dissenting opinion in the Supreme Court of the United States when the Supreme Court confronts it, for the simple reason that the Supreme Court, in a number of cases, has already covered the proposition.

The senior Senator from Minnesota, Mr. NELSON, whose mind always goes to the root of a legal question, settled it just now in answer to the Senator from Connecticut. He said this is not a tax for the right to do business; it is a tax upon the business. It is a tax upon the business privileges of a corporation, and you measure that tax simply as a standard of measurement by the net profits that the corporation obtains. You can take any other standard. You can take any standard you want if it is not an arbitrary standard.

Let me read a few lines from the Spreckles case:

The contention of the Government is—

This is the Spreckles case—

that the tax is not a direct tax, but only an excise imposed by Congress under its powers to lay and collect excises, which shall be uniform throughout the United States.

Now :

Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It can not be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts.

Now, just listen to this for a moment, because this is important in view of the discussion that has taken place :

The tax is defined in the act as "a special excise tax"—

Hear what the court says about that. It is defined the same way here—

and therefore it must be assumed, for what it is worth,—

I do not think it is worth much, but this is what the court says. I do not think it is worth much to say you can not make an act constitutional by legislation simply; but, notwithstanding, the court says this—

and therefore it must be assumed, for what it is worth, that Congress had no purpose to exceed its powers under the Constitution, but only to exercise the authority granted to it of laying and collecting excises.

This general question has been considered in so many cases heretofore decided that we do not deem it necessary to consider it anew upon principle.

And then they give the cases that I shall not even refer to. Here is the way they conclude their judgment :

In view of these and other decided cases, we can not hold that the tax imposed on the plaintiff, expressly with reference to its "carrying on or doing business of * * * refining sugar," and which was to be measured by its gross annual receipts in excess of a named sum, is other than is described in the act of Congress, "a special excise tax," and not a direct one to be apportioned among the States according to their respective numbers. This conclusion is inevitable from the judgments in prior cases, in which the court has dealt with the distinctions.

We may make some allowances for the difficulty here in the Senate of getting a proper expression of our views, because here is what the court says about the matter :

This conclusion is inevitable from the judgments in prior cases, in which the court has dealt with the distinctions, often very difficult to be expressed in words, between taxes that are direct and those which are to be regarded simply as excises. The grounds upon which those judgments were rested need not be restated or re-examined. It would subserve no useful purpose to do so. It must suffice now to say that they clearly negative the idea that the tax here involved is a direct one, to be apportioned among the States according to numbers.

This answers the point that, I think, has been made by some of the Senators on the other side, especially by the senior Senator from Idaho :

It is said that if regard be had to the decision in the Income Tax cases, a different conclusion from that just stated must be reached. On the contrary, the precise question here was not intended to be decided in those cases. For, in the opinion on the rehearing of the Income Tax cases the Chief Justice said : "We have considered the act only in respect of the tax on income derived from real estate and from invested personal property, and have not commented on so much of it as bears on gains or profits."

Now, this answers the question of the Senator from Iowa—

As bears on gains or profits from business, privileges, or employments—

If the Senator from Iowa will notice, they do not say their corporate business, privileges, or employments ; they say business, privileges, or employments—

Has assumed the guise of an excise tax, and been sustained as such.

Mr. President this settles the case that it is an excise tax. Now, the point is made that, if we are imposing excise taxes, we ought to define the corporations. We ought not to say all corporations. There is nothing in that point. Suppose we define every corporation doing business in the United States. Suppose we taxed all corporations doing business in the United States,

and defined them by this bill, just as in the sugar case here it defined two or three of them, would that be a valid bill? The answer is that it would be a valid bill, because we defined them. Instead of defining them, we say "all corporations." What is the difference? What is the difference between saying all corporations and defining all corporations? Therefore, Mr. President, I think the proposition has passed into judicial history that this is an excise tax.

It has been said that you can tax the income of the real estate corporations, that you can tax the income of corporations that are dealing in real estate. You do not tax the income of those corporations. You tax the business of those corporations, and you measure the tax by the net profits of the corporations. Of course, real estate corporations come under this bill. I do not suppose any Senator will deny that a corporation dealing in real estate, the class of corporations mentioned by one Senator yesterday, comes within this bill; but it does not come within this bill as a corporation taxed upon its profits. It comes within the bill just as any other corporation, a corporation in which a tax is levied upon the business and the privileges of that corporation, measured by the net profits of the corporation, and it comprises all sorts of corporations.

Can we lay a tax upon farming? That is the question, and one that no Senator in this body can answer, and no member of the Supreme Court can answer until the question is fully argued before it. Can you lay a tax upon professional privileges? Can you lay a tax upon the privilege of practicing medicine? Can you lay a tax upon the privilege of practicing law? I think you can. Then why can you not lay a tax upon the privilege of farming? I think you can, and I absolutely believe that you can do so, but I do not want to venture any opinion here unless I am sustained by the authority of the Supreme Court. If the Senator from North Dakota wants my judgment, if that judgment is worth anything, and

were I sitting in a case, I would say: "Yes; you can tax that privilege, and you can measure the amount of money which the farmer makes out of his farm in just the way that you can measure the lawyer's privilege of practicing his profession by the amount of fees that he makes, or the physician's right to follow his occupation by the amount of fees that he charges." I see no difference between them.

I do not believe in the unfortunate decision of the Supreme Court of the United States in the income-tax case. I have always thought that that case ought again to be submitted to the Supreme Court of the United States. I am not entirely wedded to that income tax. I do not mean the paying of the income tax. The people of my State do not like the inquisitorial system that accompanies the collection of that tax. I think that case ought again to go to the Supreme Court of the United States. They overruled the decisions of a hundred years, and they ought to be called upon to say now whether or not that decision shall stand. It is an unsatisfactory decision. It is that decision, and not my argument, that gives rise to this unfortunate distinction.

Now, Mr. President, let me call the attention to this language of the Supreme Court in the income-tax case:

We have not commented on so much of it as bears on gains or profits from business, privileges or employments, in view of the instances in which taxation on business privileges or employments has assumed the guise of an excise tax and been sustained as such.

What does that mean? I do not believe that the Senator from Texas, Mr. BAILEY, knows what that means, and, if he does not, I am sure nobody else does. Nobody knows what that means. I am not responsible for that. I think it would be a most ridiculous thing to levy such a tax. Just as the Senator from North Dakota says, you can not tax a man's profits, and you can not tax his farm; but you can tax the privilege, and

measure the privilege and value of profits to him. That seems absurd; but there is the case. What does it mean? I am not responsible for the *obiter dicta* of the Supreme Court in that case and for the illogical conclusion that it arrived at, with great respect and deference to it.

Now, I am coming to the second proposition. I am going to hurry, because I am coming to the last proposition, which is to me the most important one of all. I want to get to the second proposition, and there is not any doubt, I think, about this. The Senator from Nevada raised the point, but I think that upon further reflection there can not be any doubt in the mind of any Senator that this is a uniform tax, because in the Knowlton case the Supreme Court has held that a uniform tax means a tax which is geographically uniform.

I want to call attention to what I think has been a mistake, if I may be permitted to say so, which has been made upon the other side of the Chamber. They have argued this whole case as if it were under the fourteenth amendment. There is the trouble. The fourteenth amendment does not operate on the Government of the United States. The fourteenth amendment operates on the States. While the States can not make an arbitrary discrimination as against the fourteenth amendment, there is nothing on earth to prevent this Government from making an arbitrary discrimination, provided it maintains geographical uniformity. In other words, the Government can do what the States can not do. I maintain that proposition here in this body. The Government has interdicted the States from doing what the Government itself can do.

The Government has said to the States, under this amendment, that you can not make arbitrary distinctions, you can not make unfair classifications. But we can make arbitrary distinctions, the Federal Government can make unfair discriminations, provided that we remain a geographical uniformity,

that is to say, provided that the unjust classifications are maintained in every State of the Union. That is the proposition here, and I do not think any lawyer in this body will disagree with me. There is a geographical uniformity, however arbitrary this distinction may be. It is an arbitrary thing to tax the profits of a corporation and not to tax the profits of an individual; but the Supreme Court has said that you can do that arbitrary thing, provided that you do it with geographical uniformity through the States. I shall not read that decision, because I want to get through.

Mr. President, if this is a direct tax, that is the end of the tax under the decision of the Supreme Court. My whole proposition is based upon the foundation that it is not a direct tax. If it is an apportionable tax, then it comes within this unfortunate decision; and if it is an apportionable tax or if it is a direct tax, what is the sense of passing the amendment?

I pass to the third point, Mr. President. The third point is this—and it has given me some trouble, but I will finish it in a very few moments. Is this amendment an attack or an infringement upon the reserved rights of the States? That is the point that is troubling the Senator from North Carolina, and some other Senators on this side. At first it gave me some trouble, but after an examination of the case the field is perfectly clear. Is this tax destructive of the powers of the States? If it is, it is unconstitutional; if it is not, so far as that proposition is concerned, it is good. When we put a tax upon a business conducted under a State charter, does that so far invade the functions of the State as to make this an infringement upon the reserved rights of the State? I only want one decision on that. I must confess I do not like the decision. None of us on this side of the Chamber like it; but there it is, and we can no longer battle with it. The junior Senator from Iowa, Mr. CUMMINS, adverted to it as a distinction between excise and property rights, but I refer to it for one sole pur-

pose, and that is to see how far this Government can lay a tax upon franchises granted by a State. It is the case of the *Veazie Bank v. Fenno*, in Eighth Wallace, page 547. It is only a few lines. This was the case, as we all recollect, that laid a tax of 10 per cent. upon the circulation of State banks.

I am only quoting this case now for one purpose, and that is in support of the third proposition that I have advanced—that the proposed amendment is not an infringement upon the rights of the States. Chief Justice Chase delivered the opinion of the court. Mr. Justice Nelson and Mr. Justice Davis dissented. It was argued as ably as any case ever was argued before the Supreme Court of the United States, and, with great respect to that illustrious tribunal, it was decided about as meagerly as any case was ever decided by the Supreme Court of the United States. There it is; and it has been recognized since 1869 in one case after another as the law of the land.

Is it—

Speaking of this tax—

Is it, then, a tax on a franchise granted by a State—

That is, on the circulation of banks chartered by the State—

which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?

That is where the law stands. I do not know what the opinion of the Senator from Texas, Mr. BAILEY, is upon that point. Perhaps he differs with me upon it. He may think, perhaps, that the Government has a right to lay a tax upon a franchise granted by a State. I do not think so. I find nothing further to aid me in arriving at a conclusion upon that matter except this ambiguous language of the Supreme Court.

Let me finish this case, and let me examine that line of cases. If I do not give them correctly, the Senator from Iowa will

correct me. Just let me finish these few lines from the case of the *Veazie Bank v. Fenno*. I think the Senator is perfectly right in his construction of the cases. The court say:

We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it can not be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property—

I do not cite this case for that portion of it—

often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

I am not prepared to say, without any further elucidation by the court, that I would go as far as this. I will tell you what has given me trouble in this case; and I should like to understand from the Senator from New York whether he agrees with me upon that point. I do not believe, if this was a tax levied upon a charter, that it would be a good tax. I do not think, if we were to pass a law here levying a Federal tax upon a State Charter, upon the power of a State to grant a charter, that that would be a valid tax. I do not know what the opinion of the Senator from New York is upon that point. I draw a clear distinction between a tax levied upon the power of a State to grant a corporate charter and a tax levied upon the business of the corporation to which it grants the charter.

The Senator from Iowa has all these points under consideration, and we come now—and I will dispose of them in a moment—to just that line of cases. Let us look at them a moment. The State can not invade the functions of the Federal Government, and the Federal Government can not invade the function of the State. The Government has its powers under the Constitution; the State has its reserved rights, and it would

have its reserved rights if the tenth amendment had never been adopted. The tenth amendment never conferred upon the States their reserved rights, because the States possessed those reserved rights. All the tenth amendment did was simply to confirm them; for the States had the reserved rights without the confirmation.

A State can not tax the functions of the Federal Government. I have here Judson on Taxation, a book written by an eminent lawyer of Missouri, who was, I think, the colleague of Mr. Harmon. Strange to say, he is not related to him, but his last name is Mr. Harmon's first name. They were the gentlemen who went out of the Government cases, I think—Harmon and Judson. But, at any rate, Mr. Judson is a distinguished lawyer, and he wrote this book on taxation. I have looked at it, but he does not give a full report of the cases.

One of these States taxed the franchises of the Pacific Railroad. The Supreme Court held that they had no right to tax the franchises of the Pacific Railroad, because it was a government franchise. One of the other States taxed the roadbed and other property of the corporation. What did the Supreme Court say? As I recollect, the Supreme Court said that the first tax was unconstitutional, and the second tax was constitutional. Why? Because the tax upon the roadbed of a railroad, while it might ultimately destroy the governmental franchise of the railroad, was nevertheless primarily a tax upon the property of the road—though it might operate from a secondary point of view upon the franchise of the road, it was valid.

I am satisfied in my own mind that this is not a tax upon the franchises of a State. If it were, I should never stand here and vote for it. I should lift my voice in a humble protest against such a proposition as that, because, I want to say in conclusion, I have always been what is known as a "States'-rights Democrat." I am not ashamed of the title. I am proud

of it. I represent one of the original States that signed the covenant, and it is that covenant that ties the Constitution in the bonds of eternal unity. That covenant must be kept sacred and inviolate. On that rock we stand. When that rock disintegrates we perish. Every crumbling fragment of it imperils the Republic. And if during the time I have been in this body I have accomplished no other purpose than that of slightly impressing upon the rising generation that this covenant must be kept intact in all its essential parts and that the reserved rights of sovereign States must be kept inviolate and unprofaned, then I am satisfied with that accomplishment, if I shall never receive another honor at the hands of my countrymen.

AFFAIRS IN NICARAGUA.

Speaking to his resolution December 13, 1909, holding that President Zelaya had no right to execute two Americans enlisted in the revolutionary army of General Estrada, Senator Rayner plead for the arrest and trial by the United States of the perpetrator of the crime.

Mr. President, in making a brief presentation of the subject involved in this resolution, I realize the fact that I am dealing with a delicate matter, and I do not propose to permit my feelings to influence my judgment. I have given the legal aspects of the case my most patient consideration, and I desire to say that, so far as the law that governs it is concerned, in order to arrive at a proper conclusion the most diligent investigation of precedents and authorities that relate to the question at issue is absolutely demanded, and no opinion that is simply based upon a superficial familiarity with the principles involved, no matter from how high a source it emanates, would carry much weight. Having given the subject my most laborious attention, realizing the complications and embarrassment that surround it, I have arrived at certain conclusions based upon cases

and decisions that satisfy me that we can reach the crime set forth in the resolution by a method which may amount technically to a declaration of hostilities against Zelaya, but will not carry with it a general declaration of war against the Government of Nicaragua.

Mr. President, in offering the resolution, I want it understood that I have not done so for the purpose simply of addressing the Senate upon it, but I propose to follow it up with all the zeal I can command.

The question that I present is one more of law than of war. A great crime has been committed against the rights of American citizenship which can not be allowed to slumber. The guilt does not rest upon the people of Nicaragua, and therefore to punish them or to seize their ports or custom-houses, which would be an easy matter to accomplish, would not subserve the purpose of my inquiry. We must not confound the action of the Dictator of Nicaragua with the conduct of the subjects over whom he rules. This resolution is directed against him individually, and I want it entirely separated from any proposed steps that we may take in reference to our interference in Nicaragua. The two propositions must be kept apart.

I also desire to say that my strongest sympathies are and always have been enlisted in favor of the people of Central America, and I want to see the friendliest relationship maintained between their governments and ours. I believe in cementing the ties that now exist between us, and earnestly hope that nothing will ever occur that will compel us to assume any unfriendly attitude toward them. I, therefore, want to separate this unfortunate occurrence from the general situation of good will and amity that prevails between these republics and the United States, so that it shall be isolated and rest upon the environment that surrounds it, without affecting in the slightest degree the policy that the United States has

adopted toward the Central American States, and which, I trust, will continue to be exercised for the mutual benefit and advantage of both of them for all the years to come.

I have no doubt that the President and the Secretary of State will persist in their efforts to have this great crime which has been committed against American citizens thoroughly investigated and the arch-criminal brought to justice. No civilized country upon the globe would maintain silence in the face of such an outrage, and it will do no injury, as this resolution contemplates, to give the President all the authority that may be necessary for him to proceed in the premises. The question of the recognition of the revolutionists as belligerents is therefore not involved in this resolution, nor their recognition as a *de facto* government in the event of the successful termination of the revolution. Before presenting, however, the point embodied in the resolution, I desire to say a few words upon the subject of the rights of the revolutionists as belligerents, and the recognition of any government that they may establish.

It is a well-settled principle of international law that in case of war between independent nations, parties immediately become entitled to the rights of belligerents. In a case of this sort, under the present circumstances, the Supreme Court has held that the recognition of belligerency depends upon the magnitude of the struggle and the degree in which it affects the interests of the recognizing power. The revolutionists have practically covered and maintained an effective blockade upon the entire eastern coast of Nicaragua on the Caribbean Sea, and through the unlawful conduct of Zelaya the interests of our country have been so largely affected and involved that it is my judgment that the Secretary of State so far has acted strictly within his limits and within the jurisdiction conferred upon him.

In the event the revolutionists should be successful and establish a *de facto* government, the principles of law are also

well settled that will govern the case. These principles have never been announced in more explicit terms than they were by President Pierce in a special message to Congress on May 15, 1856, in which he stated:

It is the established policy of the United States to recognize all governments without question of their source, or organization, or of the means by which the governing persons attain their power, provided there be a government *de facto* accepted by the people of the country, and with reserve only of time as to the recognition of the revolutionary governments arising out of the subdivision of the parent states with which we are in relations of amity. We do not go behind the fact of a foreign government's exercising actual power to investigate questions of legitimacy; we do not inquire into the causes which led to a change of government. To us it is indifferent whether a successful revolution has been aided by foreign intervention or not; whether insurrection has overthrown existing government and another has been established in its place, according to pre-existing forms, or in a manner adopted for the occasion by those who we may find in the actual possession of the power. All those matters we leave to the people and the public authorities of the particular country to determine; and their determination, whether it be by positive action or by ascertained acquiescence, is to us a sufficient warranty of the legitimacy of the new government.

Having briefly made these suggestions, I come now to the proposition that is involved in the resolution. The facts are very plain. Two American citizens had enlisted in the army of the revolutionists under General Estrada, one of them being commissioned as colonel in his forces. I understand from a dispatch received this morning that both of them held the commission of colonel in his forces. These men were not guilty of military treason, and the military ordinances of Nicaragua expressly stipulate that the penalty of death can only be legally enforced when there is undisputed evidence of military treason. They were not spies, because a spy is a person sent by one belligerent to gain secret information of the forces and defenses of the other to be used for hostile purposes. They were simply, when captured, prisoners of war, and the universal law of civilized nations now forbids the killing or wounding of prisoners of war, or the infliction of any punishment

upon them which they have not merited by an offense against the laws of the country since their captivity. While our statute forbids any military expedition against a foreign country with whom we are at peace, emanating from this country, it has been held over and over again by the Federal courts that American citizens have a right to enlist in foreign military service or in military operations carried on between different parts of the same country. In 1842, Mr. Webster, then Secretary of State, laid down the doctrine that if citizens of the United States enlisted in the service of an insurgent power whom the United States acknowledges as belligerent, but which is not so acknowledged by the parent state, should be treated, when captured by the parent state, otherwise than as prisoners of war, and their release when demanded should be refused, consequences of the most serious character would necessarily ensue. These men then, if the official reports that we have are true, have been murdered in defiance of law, and the question resolves itself into the kind of punishment that must be exacted, and the methods or the processes by which it can be obtained.

On June 12, 1854, for outrages and indignities committed upon the property and persons of American citizens, Captain Hollins, of the United States ship *Cyane*, bombarded the town of San Juan del Norte (Greytown), the very place upon the eastern coast of Nicaragua now held by the forces of Zelaya, and after the town had been destroyed the following report was made by Captain Hollins of the transaction:

The execution done by our shot and shell amounted to the almost total destruction of the buildings, but it was thought best to make the punishment of such a character as to inculcate a lesson never to be forgotten by those who have for so long a time set at defiance all warnings, and satisfy the whole world that the United States have the power and determination to enforce that reparation and respect due to them as a government in whatever quarters the outrages may be committed.

In 1894, William Wilson, a citizen of the United States, was shot at Bluefields, also upon the eastern coast of Nicaragua, by Norberto Arguello, acting Governor of Rama, without provocation, and this Government demanded of Nicaragua that Arguello and his murderous accomplices be brought to trial and dealt with according to law.

The most instructive incident that we have in all our history occurred during the Hungarian revolt, in which the Austrian charge d'affaires had designated as a spy the emissary that we had sent to Hungary. I read an extract from the famous answer of Webster, who was then Secretary of State:

A spy is a person sent by one belligerent to gain secret information of the forces and defenses of the other, to be used for hostile purposes. According to practice, he may use deception, under the penalty of being lawfully hanged if detected. To give this odious name and character to a confidential agent of a neutral power bearing the commission of his country, and sent for a purpose fully warranted by the laws of nations, is not only to abuse language, but also to confound all just ideas, and to announce the wildest and most extravagant notions, such as certainly were not to have been expected in a grave diplomatic paper; and the President directs the undersigned to say to Mr. Hulsmann that the American Government would regard such an imputation upon it by the Cabinet of Austria as that it employs spies, and that in a quarrel, none of its own, as distinctly offensive, if it did not presume, as it is willing to presume, that the word used in the original German was not of equivalent meaning with "spy" in the English language, or that in some other way the employment of such an opprobrious term may be explained. Had the Imperial Government of Austria subjected Mr. Mann to the treatment of a spy, it would have placed itself without the pale of civilization, and the Cabinet of Vienna may be assured that if it had carried or attempted to carry any such lawless purpose into effect in the case of an authorized agent of this Government, the spirit of the people of this country would have demanded immediate hostilities to be waged by the utmost exertion of the power of the Republic—military and naval.

It will be observed from what I have said that what I am concerned in now is not the question of the belligerent rights of the revolutionists, or in case of their success their recognition either as to the *de facto* or the *de jure* government, but in the

speedy apprehension and punishment of Zelaya. This desperado is everything that the Secretary of State says about him, and a great deal more. If the country knew what is known in official circles in reference to his general depravity, it would regard the Secretary's communication as exceedingly temperate, as it shows upon its face the restraint under which he was laboring in dealing with such a character. I have watched for years the revolutionary history of Central America, and am familiar with the career of a great many of the impostors and usurpers and the grotesque and motley leaders that have sprung from their chaotic institutions, but Zelaya is probably the most despicable figure that has ever arisen in their midst. If he were simply a highwayman, we might identify him. If he were simply a tyrant who oppressed the people for the purpose of robbing them, we might particularize him. If he were a usurper who was only holding on to power as long as there was any money in the treasury to steal, or any further territory that he could sack for private plunder, we could assign him a proper place in the ranks of some of his predecessors. And if he were purely an assassin who regarded murder as a legitimate profession through which he could despoil his victims of their possessions until the time came for him to flee from the hands of retributive justice, it would be an easy task also for anyone acquainted with the political history of Nicaragua to classify him.

He is, however, all these things combined. In the school of corruption, dishonor, perfidy, and crime he stands without a peer, and exhibits in one glow of associated harmony "the pride of every model and the perfection of every master." I have been informed upon the most reliable authority that the vices of his private life are more infamous in their indescribable details than the iniquities of his public career. Such a creature as this deserves the execration of mankind. Now, as the culminating infamy of his administration, trampling upon every

instinct of humanity, in violation of universal law, in defiance of those precepts of the international code that have been recognized ever since the night of barbarism receded before the rays of civilization, he has put to torture and then to death two American citizens who were not guilty of treason, who were not spies, but whom he had captured as prisoners of war in the army of the revolutionists. This act was not only the act of a fiend, but was an insult to the honor of this Republic, and can not remain unavenged. It is absolutely preposterous for us to talk about indemnity. Indemnity is no recompense for murder. Even if we were willing to accept such a compromise, there is no one to give us indemnity, because the revolutionists will soon be in power, and the comrades in arms of these unfortunate men should never be assessed for compensation for their unlawful death. It is said that we ought to break off official communication with his accredited representatives. We have already done that, but that amounts to nothing, and is a matter of absolute unconcern to him. Then it is said that we ought to declare war against Nicaragua. I think that is unnecessary, except in so far as this resolution may be construed into what is known in international law as a declaration of hostility *sub modo*—some of the authorities speaking of it as limited or imperfect hostilities. It is a declaration against the ruler of Nicaragua in person and not against the Government, which may soon be out of his grasp. The proper step to take is, therefore, in my judgment, that which is embodied in the language of the resolution, and that is, by every process and method that may be necessary, to apprehend the murderer and bring him to trial.

This Government is a cowardly Government if it does not make an example of Zelaya before the eyes of the civilized world. This case will not admit of any trifling or concessions. If two American citizens—I care not who they were or what they were, citizens in high standing as they have been reputed

to be or soldiers of fortune—have been murdered by Zelaya, then he must be made to pay the penalty of his crime. No other punishment will meet with the favor or the temper of the American people. I have supreme confidence in the Secretary of State, and I believe he is proceeding with measured steps, and that he is reaching toward the end. I have also an abiding confidence in the courage of the President. He will not, and he can not, permit this matter to languish. Once spread before the American people the details of the execution, and our people will rise in arms and demand retribution. They have not yet fully absorbed the significance of this deed. It is well, therefore, that our gunboats and cruisers are guarding the coasts of Nicaragua, both upon the Pacific and upon the Caribbean Sea, so that Zelaya can not escape. He is ready to flee now.

The only question with him is, whether he can get away with the money he has stolen. I believe that he would just as leave lose his head as lose his money. This is all for which he desires the continuance of power, and whenever the moment arrives that the plunder gives out, then he will make his plans to escape and claim protection at some foreign court. He is trying to imitate the example of Castro. Castro, however, was not guilty of murder; he was simply an ordinary brigand and robber. This criminal has trailed in the dust the flag of his country, and I do most earnestly hope that in his negotiations with the insurgents, Secretary Knox will insist upon the condition, and that is, that we will only give them our help upon their promise not to permit Zelaya to escape. He must be brought to trial. The laws of God and of civilization and the honor of the Republic demand it. As much as I am opposed to participating in these Central American revolutions, as they are called; as little as I care, generally, whether one party or the other is in possession of the government, or rather of the treasury; as often as I have said upon this floor that we must keep aloof from these controversies, no such circumstance as

this has ever been presented to our attention. And in this case I would not hesitate not only to give our moral support to the revolutionists, but the moment that they feel that they are unable to master this monster and overawe the half-breed and savage barbarians that surround him in his fortified palace at Managua, and transfer him to a fortified prison under the constructive custody of the United States, that moment I would give them our actual support. This would not practically amount to a declaration of general war against the people of Nicaragua, because the people of Nicaragua want to be free from this reign of terror.

It might be said that if the revolutionists succeed he could not obtain a fair trial in Nicaragua. He would obtain a much fairer trial than he accorded to the men whom he murdered. But if that is the case, and he can not obtain a fair trial in his own country at the hands of the revolutionists, then there is not the slightest obstacle in the way of trying him by a military commission in Nicaragua at the hands of the United States. If we can apprehend him—and there is, as a matter of course, no difficulty in doing this—we have the right to organize a military court and try him. The territory on which he is apprehended becomes conquered territory *pro tanto* within the definitions of international law, and he becomes a prisoner of war charged with the crime of murder.

He is not a civilian. He is a military commander, and as such, having committed the crime of murder against two American prisoners of war, he is subject to military law. I do not like the term "martial law." Under the cases it really has no definite meaning, and I would prefer, therefore, to speak of it as military law. He becomes our prisoner, and charged with this crime, his guilt or innocence can be determined by a military court. This right is too well established to require any citation of cases to support it. These trials have taken place frequently under similar circumstances, and civil

tribunals have never interfered with them. His crime was a military crime in time of war, committed against the United States and in violation of the law of nations, and he can be made to answer for it before a military tribunal.

In the well-known case of *ex parte Milligan*, 4 Wallace, page 2, counsel upon both sides and the Supreme Court conceded that a case of this nature was a proper case for a military court. The court held that Milligan, being a civilian, was entitled to a trial before the civil courts. This case was argued by some of the ablest lawyers in the United States, and I quote some extracts from the argument and the decision.

Upon page 14 Mr. Butler, who was arguing the case for the United States, thus stated the law :

Offenses against military laws are determined by tribunals established under the acts of the Legislature which created these laws, such as courts-martial and courts of inquiry.

* * * Hence arise military commissions. Martial law and its tribunals have thus come to be recognized in the military operations of all civilized warfare. Washington in the Revolutionary War had repeated recourse to military commissions. General Scott resorted to them as instruments with which to govern the people of Mexico within his lines.

Upon pages 29 and 34 of the same case, Mr. David Dudley Field, who was arguing the case for the petitioner, made this statement :

What is a military commission? Originally it appears to have been an advisory board of officers convened for the purpose of informing the conscience of the commanding officer in cases where he might act for himself if he chose. General Scott resorted to it in Mexico for his assistance in governing conquered places. * * * It will now show that military tribunals for civilians or non-military persons, whether in war or peace, are inconsistent with the liberty of the citizen and can have no place in constitutional government.

Upon page 57 Mr. Garfield, for the petitioner, uses this language :

* * * In a military department the military commission is a substitute for the ordinary State or United States court when the latter is

closed by the exigencies of war or is without the jurisdiction of the offense committed.

In delivering his opinion in the case, the Chief Justice uses this language, upon page 137:

We think that Congress had power, though not exercised, to authorize the military commission. * * * The Constitution itself provides for military government as well as civil government, and we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former. What, then, is that proper sphere? Congress has power to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, and to provide for governing such part of the militia as may be in the service of the United States. It is not denied that the power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. This has been so understood and exercised from the adoption of the Constitution to the present time. Nor in our judgment does the fifth or any other amendment abridge that power.

I shall not now, as I have already intimated, pass upon the question as to the place where a trial of this sort ought to take place. I give my opinion upon the following points, whatever that opinion may be worth:

First. That Zelaya, the President of the Republic of Nicaragua, was the commander-in-chief of the military forces of the Republic.

Second. That two American citizens living in Nicaragua had enlisted in the revolutionary forces of General Estrada and were lawfully serving under his command.

Third. That these men were captured as prisoners of war; that they were neither spies nor had they been guilty of military treason, nor were they guilty of any offense against the Government of Nicaragua since their capture.

Fourth. That under these circumstances, as admitted by Zelaya, they were captured and shot to death.

Fifth. That if with the aid of the insurgents or otherwise, Zelaya is apprehended by the United States, the territory within which he is taken becomes conquered territory *pro tanto*, and he becomes a military prisoner of the United States who has been guilty of the crime of military murder against citizens of the United States.

Sixth. That under these circumstances Congress has the right either to organize a tribunal itself or to authorize the President to do so for the trial of Zelaya in order to determine upon his participation in the proceedings aforesaid and upon his guilt or innocence in the premises.

Now, before closing, let me give one or two more authorities upon propositions I have referred to. I read from another document of Mr. Webster in reference to prisoners of war :

Prisoners of war are to be considered as unfortunate and not as criminal, and are to be treated accordingly, although the question of detention or liberation is one affecting the interest of the captor alone, and therefore one with which no other government ought to interfere in any way ; yet the right to detain by no means implies the right to dispose certain duties, among them that of providing the prisoners with the necessaries of life and abstaining from the infliction of any punishment upon them which they may not have merited by an offense against the laws of the country since they were taken. (Mr. Webster, Secretary of State, to Mr. Ellis, February 26, 1842, MS., Inst Mex., XV, 151.)

The law of war forbids the wounding, killing, impressment into the troops of the country, or the enslaving or otherwise maltreating of prisoners of war, unless they have been guilty of some grave crime, and from the obligation of this law no civilized State can discharge itself. (Mr. Webster, Secretary of State, to Mr. Thompson, Minister to Mexico, April 5, 1842, Webster's Works, VI, 427, 437.)

I read now our own regulations to show that these men were not guilty of treason :

A traitor under the law of war, or a war traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy or holds intercourse with him.

In this connection, let me give you an article from the Nicaraguan code, to show that these men were not guilty of any crime that deserved punishment by death. This is from a dispatch sent by Estrada to the State Department:

SUB-SECRETARY OF STATE MOREIRA.

Article 472 of the military ordinance of Nicaragua bears on the penalty to be inflicted upon prisoners, and stipulates expressly that the penalty of death can be legally enforced only when there is undisputed evidence of military treason. Evidence in the cases of Leroy Cannon and Groce show that this was not the case, according to officials of the State Department, who hold that President Zelaya's own version makes this point clear.

And then General Estrada goes on to say:

Señor Castrillo, representing the provisional government here, received telegrams from General Estrada, provisional president, today, saying:

"Groce, who was ex-general manager, or ex-superintendent, of the La Luz y Los Angeles Mining Company, and Cannon were men held in highest esteem, gave their services voluntarily to our liberating army, each having the rank of colonel. In neither case was the death sentence justified. They were not in the service of Zelaya. There has never been in the history of all Central America a similar monstrosity perpetrated as the shooting down of these two Americans.

"ESTRADA."

In an interview in the Washington Post, a paper that has kept in close touch with the situation, Zelaya says:

The coercion of the United States will not redound to the credit of that nation, whose motives are questioned in all Latin America.

There is not a word of truth in that. Our motive is not questioned anywhere in Latin America, except by him.

The initiative in the shooting of Groce and Cannon was not mine—

That is not true—

I simply refused to extend clemency to them after a properly constituted military tribunal had passed upon the case.

This is not true. Under the Nicaraguan code no sentence can be executed except by command of the commander-in-chief, and he was the commander-in-chief.

While I am ready to surrender the presidency, I can not do it precipitately—

He wants time to get the money out of the treasury—

as it would result in uprisings by several factions, each of which is eager to secure power.

What power? Money.

I am in negotiation with the revolutionists—

There is not a word of truth in that, as the dispatches of this morning show—

I am in negotiation with the revolutionists to secure their indorsement to a successor who will be acceptable to all parties, and have submitted the name of Jose Madriz, Judge of the Cartage Court.

He is no more acceptable than Zelaya is acceptable. He is the man who was made judge by Zelaya. He is the one who helped to break the treaty of arbitration made among Guatemala and Honduras and Salvador and Costa Rica and Nicaragua.

Allow me to read this before I finish, from a biography of his:

In 1906 there were three candidates. Two were unknown, a Don Jose and a Don Santos. The third was, of course, Zelaya. When the returns were counted all three had been elected in the person of Don Jose Santos Zelaya.

Two of them were fictions. He thus had himself elected.

Human life has been a much lesser consideration in his mind than the anger of a moment. Not long ago an arsenal exploded, probably from spontaneous combustion. The colonel commanding the garrison was ordered into the middle of the ruin and shot, and his body was burned, without trial.

Lately he has moderated some of his punishments. But when Roy

Cannon reached Nicaragua this President was having pepper and alcohol rubbed into the wounds of those who had been flogged.

With his almost fabulous receipts, he has erected two palaces in Nicaragua and one in Belgium, and has stored a fortune abroad—so that if ever he shall escape the fox-like counselors who surround him a harbor will be open.

You understand, Mr. President, there is money in the treasury, and his counselors are watching him. They are watching him so that he can not take the money, and he is watching them so that they can not take it. Those are what he calls the factions.

He has thrust editor after editor in jail for publishing items that only inferentially reflected upon his management.

He has made religion a mockery, allowing a paganism to develop into forms worse than atheism.

He acknowledges 45 children, of whom 7 are those of his beautiful Belgian wife, formerly Mlle. Cuosin.

How many does he not acknowledge? I will read this further. I do not know whether I ought to read it or not. However, I see nothing objectionable in it.

He orders any pretty girl who catches his fancy into his great palace, and the father who protests—there are yet fathers and mothers in Nicaragua who do protest—is condemned to jail or to convict labor.

And this, Mr. President, is a Republic. Oh, Liberty, what Republics have been created in thy name! I do not desire upon this occasion to go any further in this discussion.

I insist, therefore, before this body, that this is not a case alone for indemnity nor for the severance of diplomatic communication. No such recreant move as this will satisfy the demands of justice. If he had the right to sentence these men to death and execute them in cold blood, then we must acknowledge that right and recognize it before the nations of the world. If he did not have that right, no matter how petty and insignificant he may be in the eyes of diplomacy or upon the sphere of the world's action, no matter how trivial and unimportant a sta-

tion his Government may occupy, this Government is his accuser, and if he is guilty he must be awarded the doom and fate that he deserves, so that every tyrant on this earth in every nationality under the sun, and in every government, large or small, and especially these dictators in several of these Central American States who have received every favor and consideration at the hands of the United States, and to whom has been extended the official hospitality of our land, and who in return therefor, have exhibited to us at times the bitterest hatred and visited upon our citizens the most cruel indignities and outrages, shall be told once and forever that our flag follows our citizens wherever they go, and that when an assassination like this occurs the malefactor must take his place like any other culprit at the bar of criminal justice, and must answer for the deed with his liberty or his life.

POSTAL SAVINGS DEPOSITORIES.

During the long debate in the Senate upon the bill to establish postal savings banks, Senator Rayner on February 7, 1910, assailed the measure as unconstitutional, in one of the most profound arguments of his career.

I shall not discuss the policy of this legislation. Whenever a measure is presented in Congress to which my attention is directed, I propound to myself the antiquated question: Is this legislation authorized by the Constitution? I apprehend that this is a question everyone should address to himself. I have not been able to find any constitutional ground whatever for this measure. No one who has read the Constitution of the United States will contend for a moment that it comes under any of the express powers of the instrument, and the utmost that will be claimed for it, I suppose, is that under the eighteenth clause of section 8 of Article I, it is the necessary and proper law to carry into execution the delegated powers. I

have searched in vain for any decision sustaining this contention. It is not a law necessary and proper to carry into execution clause 2 of section 8 of Article I, which gives Congress the power to borrow money on the credit of the United States, because this enactment does not purport to be for any such purpose. This Government should not borrow money simply to loan it out again. That would invest us with the power of acting as a loan association or a pawnbroker, and I recall no delegated power that confers upon the Government either capacity.

This is not a bank that we are organizing, and, therefore, does not come within the meaning of the decision of *McCullough v. The Bank of the United States*, in 4th Wheaton, or the subsequent cases along the same line. This does not pretend to be a bill to borrow money upon the credit of the United States. Its title is:

To establish postal savings depositories for the depositing of savings at interest, with the security of the Government, for repayment thereof, and for other purposes.

In other words, I want to impress upon the Senate in the most emphatic way I can, substantially repeating the language of Chief Justice Marshall in the great case I have referred to, that legislation like this, is not the end for which other powers are exercised, but always the means by which other powers are accomplished. It must pass as incidental to other powers that are given. We have not heard one word throughout this entire debate as to the express power that it is intended to execute. The power to create a postal depository is not an express power. The power to lend money to the banks is not an express power, and the power to invest in government or other securities is not an express power. In this bill, however, these powers constitute the end and not the means. If these powers constitute the end, then the Constitution does not war-

rant them. If they constitute the means, then I respectfully challenge you to name the end that they accomplish.

It is said that the Government has a right to organize a bank or charter a bank. Of course it has. Why? Because a bank is an instrumentality for carrying out a governmental function. It is not an end. It is the means of accomplishing some of the enumerated powers. Every member of our profession here will admit that this Government would have no right to organize or charter a bank simply for the purpose of going into the banking business. This Government has no right to go into the banking business, except in aid of the enumerated powers. The case that I have cited, upon the philosophy of which all subsequent decisions rest, was argued by Webster, by Pinkney, by Wirt, and by Luther Martin. Three of these illustrious advocates came from my own State, and they constituted as great an intellectual combination as was ever assembled before any judicial tribunal in the world.

Wirt, that gifted genius, with an inspired mind when it came to analyzing the profound principles of jurisprudence, formulated the argument that Marshall followed step by step in delivering the imperishable opinion of the court. What was it that Wirt claimed? That the Government had a right to go into the banking business as an end under any of the powers in the Constitution? Never for a moment. There is a mistaken idea like this prevalent here among some members of this body, but no jurist, high or low, who ever presided over any court, State or Federal, ever gave utterance to such a sentiment.

Here is what Wirt said, and as Attorney-General of the United States all that he claimed, and Marshall never went a step beyond this utterance. Speaking of the bank, he said:

We contend that it was necessary and proper to carry into execution several of the enumerated powers, such as the power of levying and collecting taxes through this widely extended empire; of paying the

public debts; * * * of borrowing money; * * * of regulating commerce; * * * of raising and supporting armies and a navy, and of carrying on war. That banks diffused throughout the country are appropriate means of carrying into execution all these powers, can not be denied.

Now, I ask again, where is the power that this legislation is to execute? I challenge an answer under the decisions. This Government has no right to go into the banking business, except as an instrumentality to carry out some governmental function. Government banks can be created, and banks can be incorporated. Why? Simply because they are, within the language of the Constitution, the necessary and proper means to carry out some of the delegated powers of the Constitution. We could not pass an act of incorporation for any of the purposes indicated in this bill. Why? Because there is no governmental function involved. The depositing of money by the people is not a governmental function. Lending money by the Government is not a governmental function.

What is the object of this bill? To enable the people to deposit their earnings; to enable the Government to borrow it after it is deposited in order to loan it out again. But these are not the necessary and proper means for any end at all defined in the Constitution. It is the end itself, under this legislation, and it is the purpose of the bill. There is nothing beyond it; and I challenge you to show me the provision of the Constitution under which it arrays itself, either expressly or by implication.

Let us not make the mistake, therefore, of supposing that this is a bank that we are organizing. I will give you the definition of what a bank is. I read from the best text-book, perhaps, on that subject—Morse on Banks and Banking; volume 1, page 6, section 2:

A bank is an institution, usually incorporated, with power to issue its promissory notes intended to circulate as money (known as bank notes), or to receive the money of *others* on general deposit, to form a

joint fund that shall be used by the institution for *its own benefit*, for one or more of the purposes of making temporary loans and discounts, of dealing in notes, foreign and domestic bills of exchange, coin, bullion, credits, and the remission of money; or with both these powers, and with the privileges, in addition to these basic powers, of receiving special deposits and making collections for the holders of negotiable paper, if the institution sees fit to engage in such business.

These postal depositories have no right to issue promissory notes intended to circulate as money. They have no right to use the fund for their own benefit. They have no right to discount negotiable paper, or to deal in foreign and domestic bills of exchange, or to act as collecting agents for the holders of negotiable paper. They are not government banks or national banks, or any other sort of banks, and they have no right to exercise any of the functions which go to constitute a bank. They are simply paternal institutions to take care of the people's money and to act as their custodian, guardian, or committee—a novel and original conception in these United States, however well established it may be in other countries that have no written constitution—a design that was never dreamed of by the framers of the instrument. And throughout all the long line of Federal cases, I call now for a single decision that has ever justified or warranted an undertaking similar to this either in form or in substance.

This bill, then, simply provides for a savings depository, without any banking privileges, and with no pretense of carrying out a governmental function authorized by the Constitution. And it differs as much from a bank as it does from a post-office, which is the next claim in which, perhaps, refuge will be sought. This is clause 7 of section 8, but it can hardly be conceived that a post-office or a post-road is the same thing as a savings institution. Adhering to well-established legal definitions, and keeping within the range of professional sanity, there is no more similarity between a post-office and a savings institution than there is between a post-office and an aquarium.

or a zoological garden. Nor will we be able to show that it arrays itself under clause 3 of section 8—that all-embracing provision, and panacea for all unconstitutional legislation—the power to regulate commerce among the States. On the contrary, the only commerce, if any, that it pretends to regulate is the loaning out of the invested money to neighboring banks in proximity to the post-office within the State, and not out of the State. There is not a single feature of the transaction embodied in this bill, from its inception to its completion, that has the slightest connection with or effect upon interstate commerce. Therefore, you can ransack the whole Constitution and not find any warrant for this proposed enactment. And, therefore, its author and advocates, in all the arguments that have been delivered upon the subject, with a single exception that I shall presently refer to, have not pretended to justify its constitutionality.

I do not know what the Supreme Court will do with it, if it should become a law, nor can I permit a prophetic utterance that the Supreme Court will pronounce it constitutional upon some ground or another, to influence me in my action. With the profound respect that I entertain for this august tribunal and each of its members in supporting measures here, I must find the sanction of the law before their passage, and not vote for them in the expectation that some other forum will, after their passage, discover some constitutional authority for their enactment.

I want it distinctly understood that I have not given the policy of this legislation any consideration, because the assumption of its constitutionality—an utter unproven and indefensible assumption—must be made perfectly clear to me before I can be called upon to investigate its merits. Perhaps some profound student of the Constitution, some great discoverer of hidden and latent constitutional prerogative, will arise upon this floor before the discussion ends and point with

unerring certainty to the clause of the article upon whose bosom this contemplated legislation has lain dormant for a century; and until then I reserve my right to question its authority.

I want it distinctly understood before this body that I am not influenced in the views that I take by any of the banking interests of the country. I have not held communication with any bank, directly or indirectly, or any of its officers, in my State or elsewhere, upon this subject. And I assure you that if I was in favor of this legislation upon the grounds of public policy, and considered it a lawful measure, without asserting any degree of independence greater than that maintained by anyone else in this Chamber, I would not permit all the banking interests in the country to influence me the other way. Nor can I, on the other hand, permit any popular demand that may exist in its favor to induce me to act contrary to my own belief and convictions. That is often the trouble with a great many of us—and I include myself in the number—that we vote for measures that we think the people want, without trying to educate them up to the point that they can not have them except at the risk and peril of our institutions. In my own State I am quite sure that if I could satisfy its intelligent constituencies, that this measure finds no warrant or authority in our organic law, that they would not desire me to vote for it, no matter how convenient or advantageous it may be.

This brings me now to the only ground upon which this bill has been placed so far, and it really furnishes the reason why I have arisen today to participate in its discussion.

A few days before the adjournment of the Senate at the last session, a brief colloquy took place between the senior Senator from Nebraska and myself, to which I have already referred, during the course of an address that the Senator was delivering upon this bill, and to which I again make reference now. His address was replete with valuable information, and full of the fire and force that always characterize his utterances upon the

floor. It was preceded at the last session, as it has been followed at this session, by a powerful and instructive argument upon the measure by the senior Senator from Montana, who is in charge of this bill, and who always illumines and unravels every subject that he discusses. In all of his arguments upon the subject he has given us a presentation so full of interest and information that it leaves very little, if anything, for anyone else who is in favor of the measure to say.

I now quote this colloquy between the senior Senator from Nebraska and myself, substantially:

MR. RAYNER—Mr. President, I do not know whether I am in favor of this bill or opposed to it. The trouble I have about it is this: You will admit that we must put this bill under some clause of the Constitution. Now, what clause of the Constitution is it, under which this legislation is proposed?

MR. BURKETT—I will say, in response to the Senator's inquiry, that I expect to refer briefly to that a little later on, but I think the general-welfare clause would cover it.

MR. RAYNER—The general-welfare clause would cover everything on earth. I am aware of that.

MR. BURKETT—Well, it has covered a good many things, I will say to the Senator.

MR. RAYNER—Is that the proposition? You do not put it under the clause to establish post-offices and post-roads, for it is hardly possible that we could turn a post-office into a bank. You do not put it under the clause giving the power to coin money and to regulate the value thereof; but this bill is put under the general-welfare clause of the Constitution. Some of us want to understand that, because we do not believe—I certainly do not believe—that the general-welfare clause means anything in the world, and I do not think the Supreme Court of the United States has ever said that it does.

A little later on the Senator from Nebraska said:

I am not disturbed by any fear of lack of power that we may have to enact this legislation. As I replied to the Senator from Maryland, the general-welfare clause has been too liberally interpreted and too often relied upon to sustain necessary legislation for the good of the people to halt at this particular time and in this particular legislation.

This is not the first time that I have heard the general-welfare clause of the Constitution referred to upon this floor as a source of legislative power. When I first came to this body and heard Senators allude to the general-welfare clause as a grant of power, I looked upon it as a sort of burlesque upon the Constitution. I thought Senators were only indulging in a little pleasantry when they were asked under what clause of the Constitution does such and such legislation array itself and the answer came, in a sort of bantering way, "Under the general-welfare clause, of course." I treated it as a species of satire and irony, amusing, but entirely meaningless and harmless. But lately the same answer has come so frequently that the matter has assumed a serious aspect, and I can not sit in patience any longer, if there is any impression amongst us whatever, as the Senator from Nebraska seems to think there is, that we have any right to enact the bill that he is advocating, or any bill of any kind or for any purpose, under the general-welfare clause of the Constitution.

Let me see if I can not, in a few words, relieve the Senator's mind upon that subject, and satisfy him beyond the peradventure of a doubt that there is no general-welfare clause in the Constitution as an independent grant of power, and that no text-writer, no commentator, and no court has ever announced the proposition that the Senator contends for. I stand here now to declare that I shall never vote for any legislation if it has no other authority than the general-welfare clause of the Constitution, and I propose now to demonstrate, with precision, I hope, that this clause can never be invoked to sanction any measure that does not come under the enumerated powers of our organic law.

Let me now read the general-welfare clause of the Constitution :

ARTICLE 1, Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.

Now, what does this mean? It simply means that Congress shall have power to lay and collect taxes, duties, imposts, and excises, in order to pay the debts and provide for the common defense and general welfare of the United States. If, instead of saying, "to pay the debts and provide for the common defense and general welfare," it had said, "in order to pay the debts and provide for the common defense and general welfare," there never would have been the slightest discussion over this proposition. All schools and all political creeds agree upon the construction that I have placed upon this section, and it is too late at this hour, I submit to the Senator from Nebraska and to all others who may agree with him, to pervert its meaning and misconstrue its purpose. I shall read only a few brief extracts now, which, in my judgment, forever place this subject beyond the pale of controversy.

I read from Madison in *The Federalist*:

Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution on the language in which it is defined. It has been urged and echoed that the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections than their stooping to such a misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general-welfare expressions just cited, the authors of the objection might have had some color for it. * * *

But what color can the objection have when a specification of the objects alluded to by these general terms immediately follows? * * * For what purpose could the enumeration of particular powers be inserted if these and all others were meant to be included in the preceding general power? Nothing is more natural and common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity which, as we are

reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing had not its origin with the latter.

Now, let us see what Jefferson said upon the subject :

To lay taxes to provide for the general welfare of the United States, is to lay taxes for the purpose of providing for the general welfare. For the laying of taxes is the power, and the general welfare the purpose, for which the power is to be exercised. The Congress are not to lay taxes *ad libitum* for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased. * * *

Hamilton, who can not be charged with placing any unnecessary limitations upon the exercise of Federal power in his celebrated Report Upon Manufactures in 1791, which was, perhaps, the first interpretation of this clause, thus speaks of it :

Common defense and general welfares are not to be construed as a distinct grant of power, but are qualifications of the objects of the taxing power.

Judge Story, upon page 661 of his first volume upon the Constitution, uses this strong language with reference to this clause :

* * * Do the words, "to lay and collect taxes, duties, imposts and excises," constitute a distinct substantial power; and the words, "to pay the debts and provide for the common defense and general welfare of the United States," constitute another distinct and substantial power? Or are the latter words connected with the former so as to constitute a qualification upon them? This has been a topic of political controversy, and has furnished abundant materials for popular declamation and alarm. If the former be the true interpretation, then it is obvious that under color of the generality of the words to "provide for the common

defense and general welfare" the Government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumerations of specific powers; if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, to "pay the debts and provide for the common defense and the general welfare."

* * * The reading, therefore, which will be maintained in these commentaries, is that which makes the latter words a qualification of the former; and this will be best illustrated by supplying the words which are necessarily to be understood in this interpretation. It will then stand thus: "The Congress shall have power to lay and collect taxes, duties, imposts and excises in order to pay the debts and to provide for the common defense and general welfare of the United States;" that is, for the purpose of paying the public debts and providing for the common defense and general welfare of the United States.

I quote in this connection what Story says in reference to the preamble of the Constitution. The preamble reads as follows:

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

These are the observations of Story:

And here we must guard ourselves against an error which is too often allowed to creep into the discussions upon this subject. The preamble never can be resorted to, to enlarge the powers confided to the General Government or any of its departments. It can not confer any power *per se*; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any power, when otherwise withdrawn from the Constitution. Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the preamble declares one object to be, "to provide for the common defense." No one can doubt that this does not enlarge the powers of Congress to pass any measures which they may deem useful for the common defense.

Pomeroy, who belongs to the same school that Story does, uses this apt and unambiguous language in reference to this clause:

Congress has power "to lay and collect taxes, etc., to pay the debts and provide for the common defense and general welfare of the United States." Do these two clauses contain two separate and distinct powers, or is the latter a limitation upon the other? In other words, does the Constitution, by this language, confer upon the legislature a general faculty of taxation, and also another general capacity to pay public debts and provide for the common defense and general welfare; or does it confer a limited power of taxation, by restricting the purposes for which taxes may be laid, and confining them to the payment of debts and provisions for the common defense and general welfare? * * * If the construction should be adopted which regards the second clause as an independent grant of power, it would, in effect, be making our General Government unlimited. Providing for the common defense and general welfare includes everything which any government could possibly do; and a grant of power in these broad terms would be the same as making Congress omnipotent, equal in the extent of its functions to the British Parliament.

I quote now a few lines from John Randolph Tucker, who is one of the leading advocates of the doctrines that I believe in. He says:

To pay the debts can hardly be said to be a political power. To lay and collect taxes is a power, and a proper power, where its object is to pay the debts of the Government; and as these words "to pay the debts," are indissolubly connected with the words "to provide for the common defense," etc., it follows that these latter words must share the fate of the words "to pay the debts," and be taken to declare the object of the preceding power, and not the creation of a distinct power.

I will close these extracts by citing a few words from an opinion of Judge Rogers in the district court for the western district of Missouri, delivered on the 28th day of February, 1898, in the case of the United States *v.* Boyer. In that case, speaking of Judge Story's views upon the subject, he concludes as follows:

After a most elaborate and historical discussion of the subject, presenting the different views of the different political schools or parties, he concludes that the "general-welfare" clause "contains no grant of power whatsoever, but it is a mere expression of the ends and purposes to be effected by the preceding power of taxation." I content myself with the fact that the former construction has never been sustained by any court, and the reverse has been held so often as not to require citations to support it; while the latter construction rests upon the

theory that the "general-welfare" clause contains no power of itself to enact any legislation, but, on the contrary, the words "and provide for the common defense and general welfare of the United States," according to the most liberal constructionist, is a limitation on the taxing power of the United States, and that only.

No case has been cited tracing the power to enact any statute to the general-welfare clause above quoted, and I do not believe any can be. The learned counsel, in this connection, has cited various acts of Congress of a nature quite similar to the one in question, but no number of statutes or infractions of the Constitution, however numerous, can be permitted to import a power into the Constitution which does not exist, or to furnish a construction not warranted. * * *

In closing these references, I make the assertion that neither in the case of the *United States v. The Gettysburg Electric Railway Company*, in 169th U. S., 668, referred to by the Senator from Nebraska, nor in any other case decided by the Supreme Court or by any other court, has it ever been held that the general-welfare clause was a grant of power, but, on the contrary, all the cases in which the constitutionality of acts of Congress have been maintained have always been traced to one of the enumerated and delegated powers reposed by the States in the General Government.

I hope, therefore, that we shall hear no more in the Senate about the general-welfare clause constituting a grant of power. It strikes me like a discordant note of music that jars the melody of the Constitution and makes the whole instrument vibrate with inharmonious sounds.

I know the Constitution under the last administration was in a state of collapse. Upon a number of occasions upon this floor I attempted to show how it received blow after blow, until it was almost sent staggering to its grave. The predecessor of our present President, whatever else he may have been, was not a student of the Constitution. He did not care for its restrictions, and did not consider himself bound by its limitations. We have an occupant of that office now who is thoroughly familiar with the landmarks of his power; who, with his

judicial temperament, will not only hold himself in equilibrium, but proposes to hold in proper poise and balance the checks and safeguards of governmental power. Therefore, when he submits a question like this to us, it is worthy of our most serious consideration. The President takes the oath not only to protect and defend, but to preserve the Constitution. Now, by the solemn oath he takes, may he preserve unprofaned in all its parts, and once more call it back to resurrection and to life.

He has never said in the messages that he has submitted to us under what grant of constitutional power he has proposed this important legislation. One thing I feel sure of, and that is that he will never regard the general-welfare clause of the Constitution as an independent grant of power. Such an interpretation as this, although it would suit the heretics who are waging relentless war against the philosophy of our institutions, would convert us into a centralized government of inherent and unlimited functions; would sweep to oblivion the reserved rights of the States; would render the enumerated powers of the Charter absolutely superfluous and unnecessary; would give Congress the right to pass any legislation whatever that, in its arbitrary discretion or from political motives, it may determine upon, and in my opinion, destroying the autonomy of the States and obliterating the inviolable declaration of the Tenth amendment; and would make such a gaping wound in the heart of the Constitution that the blood that gave it life would wither in its veins.

REPLY TO SENATOR BURKETT.

During the long debate in the Sixty-first Congress upon the creation of a postal savings bank, the senior Senator from Nebraska ridiculed Mr. Rayner's old-fashioned devotion to the Constitution. On March 4, 1910, the Marylander replied in one of the most brilliant speeches of his career.

I simply rise to present a few obituary remarks upon the Constitution of the United States. It has been my cheerful custom quite a number of times in this Chamber to deliver brief funeral observations upon this lamented friend of ours. The Senator from Texas, Mr. BAILEY, and myself having participated in these obsequies and being among the principal pallbearers upon this joyous occasion, it is proper now, as the Senator from Montana, Mr. CARTER, the chief embalmer and undertaker in charge of the ceremonies, is about to close the casket, that one of us, at least, should make a few tender references to the deceased, as the Senator from Montana permits us to take a last view of its distorted features.

As the senior Senator from Nebraska, Mr. BURKETT, is one of the principal conspirators in this tragedy, and as a short time ago he delivered a biographical sketch of my constitutional infirmities, my remarks, very brief indeed, will be limited principally to the discourse of the senior Senator from Nebraska.

Before doing that, however, I desire to say that I do not agree in any sense of the word with the proposition of the Senator from Utah, Mr. SMOOT, or the proposition of the Senator from New York, Mr. ROOT, that their amendments render this bill a constitutional measure. I do not believe for a moment that you can take an unconstitutional bill, admitted to be so by the Senator from New York, and tack on to it an enumerated power of the Constitution, and

thus make the bill constitutional. I do not believe—and I say it with the utmost deference and respect to the Senator from New York, for no one in this Chamber and no one outside of it has a greater respect and admiration than I have for the learning, the talent, the ability, and, what is more than all of them, the character of the Senator from New York—that you can take any bill, admitted to be unconstitutional, admitted not to be within the delegated powers of the Constitution, and then tack on a power that does not come within the purview, or the meaning, or the intent, of the measure and make that measure a constitutional measure.

Nor do I agree with the remarks that have fallen from other Senators that the Supreme Court will not have the opportunity to look into this measure and declare it unconstitutional upon its face. Now, let me give this illustration to the Senator from New York. Suppose we were to incorporate a railroad today to run from the city of New York to the city of Albany, New York to be one terminus and Albany to be the other terminus—not an interstate railway, but an intrastate railway, to carry no freight, to carry no passengers, to perform no service beyond one terminus in the State of New York and another terminus in the same State and for local purposes alone—the Senator from New York will admit that the bill would be unconstitutional and that we have no right to pass a bill of that sort. Now, suppose that we were to provide that one-half of the profits of the railroad were to belong to the United States, or that they could borrow one-half the profits of that railroad, would that make it constitutional? I ask the Senator from New York whether, in his judgment, the right to borrow one-half the net or gross profits of that road under the borrowing power of the United States would render an unconstitutional bill constitutional by thus tacking to an unconstitutional bill one of the enumerated powers of the Constitu-

tion? Never, Mr. President, can I bring my mind to the acceptance of such a proposition as that.

We could pass any unconstitutional measure that we wanted simply by tacking on the bill a power of the Constitution, which it is not intended to exercise and which does not come within the intent and purpose of the bill and render it constitutional.

The object of the pending bill is not to borrow money on the credit of the United States. There is not a Senator on this floor who could truthfully arise and say that our purpose here is to borrow money on the credit of the United States. The Government of the United States is not borrowing money in such a way as this. This is not a bill entitled "A bill to borrow money on the credit of the United States." Whoever heard of a bill to borrow money on the credit of the United States that does not even say in its title that it is a bill intended for such a purpose? There is not a section in this measure, except these two amendments, one proposed by the Senator from New York and one proposed by the Senator from Utah, which contemplates that this money should thus be invested in bonds of the United States.

What is this amendment put in for—to effectuate a governmental purpose? Never; not a word of it. It is attached to this bill for the purpose of giving it a constitutional appearance, for the purpose of giving the Supreme Court of the United States a loophole by which it can declare this measure—a measure unconstitutional when it was offered, unconstitutional all through the debate—constitutional, by putting on an amendment to enable the Government to invest the money in United States bonds.

It is either constitutional or it is not constitutional. I do not believe, with the greatest deference to both the Senators, that either of these amendments adds one iota to the validity of

this measure. I think that this bill is just as good, or, rather, just as bad, without the amendments as it is with them.

It is said that the Supreme Court can not go behind them. Why not? Because in the oleomargarine case and the case of the *Veazie Bank v. Fenno* they said, "We can not tell what the motives of Congress were when the bill was passed." This is a different measure. The Supreme Court can very easily tell what was the motive of Congress.

Here is a bill that does not say a word about war. Whoever heard anything about war until the Senator from Utah arose in this body to declare war under a postal-depository bill? For months and months this debate has progressed. Has anybody said anything about war? Is there any war in existence? Is there any war imminent? Is there a purpose upon the part of the Government of the United States to use the postal-depository savings for the purpose of furnishing the resources of war?

I use the words, I hope, in no objectionable sense, but it is a legal subterfuge; it is an artifice; it is stratagem; it is added to this bill, simply for the purpose of enabling the Supreme Court to say, "We can not tell from the text of this bill whether it is in reality a postal-depository bill, which is unconstitutional, or whether it is a bill to borrow money on the credit of the United States, which is constitutional." It can not be done, Mr. President, because the Supreme Court will look through this bill, and not one word will they find from the beginning to the end about borrowing money on the credit of the United States.

This bill has been discussed for months. It was discussed at the last session. The Senator from Montana has been challenged, but he has declined to accept the challenge, to state upon this floor that his bill had any other purpose or any other in-

tent in view except the intent to create postal savings depositories.

Therefore, Mr. President, before I come briefly to state the purpose for which I have arisen, I want to stand here not only as a Democrat—because I do not see how our party can divide upon this question—but as a student of the Constitution, to say that I do not believe, and never will believe until the Supreme Court decides it, that when you pass a measure admitted to be unconstitutional, admitted not to be within the express or any implied powers of that instrument, that simply by saying that the Government can borrow the money from these postal depositories and invest it in government bonds, that that makes the measure come within the meaning of the Constitution.

Now, Mr. President, I will proceed briefly to reply to the address of the Senator from Nebraska. I think, perhaps, it would have been better for the senior Senator from Nebraska to have allowed his first speech upon this bill to remain as it was without attempting to correct it, because in his first speech he was simply at war with every other lawyer in the United States except himself, and in his last speech he is at war with all of them, including himself. He has precipitated himself into such a wilderness of confusion that even the senior Senator from Montana will not be able to find him; and if he should succeed in finding him, he will be utterly unable, with all his dexterity and ingenuity, to extricate him.

I tried to compliment the Senator from Nebraska when he stated a proposition that, to say the least, aroused the curiosity of every law student and apprentice in his profession in the land who read the observations of the Senator. The Senator does not desire any compliment, however. He would rather stand out in bold relief, challenging and defying the rudimentary principles of his profession, than make an acknowledgment that he had thoughtlessly stated a proposition which, upon

further reflection, he deemed it best to reconsider—an action even for a Senator of such recognized professional attainments as the Senator from Nebraska seems to be gifted with.

Now let us glance at some of the treasures of thought that fell from the Senator in this last address of his upon the subject of this bill. The Senator remarked as follows:

The distinguished Senator from Maryland, in one of his heroic and habitual defenses of the Constitution a day or two ago, criticised a speech of mine at the last session of Congress upon the postal savings bank. In fact, a little colloquy between the Senator and myself during the time of my address, which I am sure no one else who heard it took so seriously, seems to have lain heavily upon the Senator's mind during all these intervening months.

Mr. President, the Senator is mistaken. I did not take his address seriously. The Senator should exculpate me from this imputation. I have not taken the Senator seriously. Furthermore, I respectfully submit that if nothing ever lay more heavily upon my mind than the Senator's speech, I would have the lightest and most buoyant intellect of any Senator in this body.

The Senator then proceeds to say Madison was a great linguist. Admitting this to be so, there is one thing that Mr. Madison never was, and that is that, while he may have been a great linguist, he never claimed to be a ventriloquist. The Senator says:

I have neither the time, the inclination, nor the equipment at the moment to undertake an exhaustive address on this subject. I am not vain enough to hope that I shall be able to do what Hamilton and Adams and Webster and the mighty Marshall could not do.

Why not? The Senator underrates himself. He may not have the time nor the inclination, but he certainly has the equipment. The Senator is always prepared upon one theme as well as another, *semper paratus*, a gift of Providence of being thoroughly prepared upon subjects with which you are entirely unfamiliar. Why should not the Senator therefore

be able to do what Hamilton and Adams and Webster and Marshall could not do? No one of them ever delivered a speech like his. They could not do that. Therefore, the Senator can do what Hamilton and Adams and Webster and the mighty Marshall could not do. We require no greater proof of that, than this constitutional argument of the Senator from Nebraska. Great thought, great power, profound research, and above all, a matchless voice that, re-echoed through the corridors and coming back upon the waves of sound, victoriously and triumphantly rode upon the circumambient air.

The trouble with the Senator is not that he can not do what Hamilton and Adams and Webster and Marshall could not do, but that he did not live in the early days of the Republic, so that he could have shed the illuminating light of his eagle intellect upon the Constitution of the country. Mr. President, that is the trouble with a great many men of wonderful gifts—they live at the wrong time. If the Senator had been a member of the Constitutional Convention, what a different instrument we would have had, and how men like Hamilton, and Patterson, and Wilson, and Madison, and Rutledge, and Pinckney would have paled into insignificance beside the marvelous and majestic genius of the Senator from Nebraska! The Senator has done what Marshall and Taney never accomplished, because the Senator seems to have studied the Constitution only for about seven days, but within that time he has acquired a familiarity with it greater than both Marshall and Taney, who spent, together, over sixty years upon the Supreme Bench of the United States, interpreting its provisions, and both of whom, at various times, gave expression to the thought that they had hardly approached the threshold of that immortal charter.

Now, the Senator says, speaking of me:

If he had been called to preach, he probably would have specialised on funerals and chanted requiems to the dead and gone of his fellow-men.

I do not know if this classical allusion to myself by the Senator was intended as an insult or a compliment. If it was intended as an insult, I feel highly complimented, and if it was intended as a compliment, I feel deeply chagrined. I would suggest to the Senator that I have no talent along this line. I can neither sing nor chant, but if the time should unexpectedly come when the people of Nebraska desire to celebrate the Senator's political funeral, and such a great calamity should befall them, I will take the liberty of sending as my substitute the junior Senator from Tennessee, who, with his other gifts, possesses great talent in this direction, and he will chant a requiem that in lyric and pathetic tones will, perhaps, fully console the constituencies of Nebraska for the irreparable loss that they have sustained by the premature departure of the Senator at the very meridian of his brilliant power.

The Senator now goes on to observe:

I hope, however, that I am not insane enough to undertake to turn from the accepted construction of these words, quite as old as the words themselves—

Referring to the general welfare clause of the Constitution, Mr. President, the Senator should relieve me from this charge. I never said that the Senator was insane. I would not take this speech of his and upon that single effort make a decision upon that question. I have given some attention and study to diseases of the mind, but it would be necessary for me to take a number of the Senator's speeches before arriving at any definite conclusion. I therefore think that the Senator has mixed me up with some other alienist who has perhaps given an opinion upon the subject.

And now the Senator further observes, referring to me, that I deny myself the splendor of contemporary achievement. That is another mistake upon the Senator's part. I listened to the whole of the Senator's great argument from beginning to end, and, therefore, I have not denied myself what I con-

sider the splendor of the greatest contemporary achievement of modern times.

When the Senator comes right down to the great proposition with which he is struggling, in trying to reconcile himself to his former utterances, Mr. President, listen to this priceless gem:

This bill—

Says he —

would be constitutional if Congress believed it would be beneficial in raising and supporting an army.

What a sublime thought! How original in its conception and how unlimited in its expansive possibilities! Here is another jewel, plucked from the very crown of jurisprudence, as a constitutional sanction for its enactment:

It would stimulate trade—

Says the Senator—

and revive the drooping energies of the country and restore confidence to the public mind.

What do you think of that, Mr. President, that among the enumerated powers these undiscovered faculties had been concealed for years until discovered by the Senator from Nebraska, the delegated power upon the part of Congress to restore confidence to the public mind and revive the drooping energies of the country.

Mr. President, I have made these few remarks simply to prevent the Senator's speech from being consigned to oblivion. I have studied it word for word and bestowed upon it all the concentrated attention of my mind. We know by experience that, no matter what merit it possesses, it may in the multiplicity of arguments that emanate day by day from the Halls of Congress be lost to view, and when once lost to contemporary history it may be gone forever. Sad episodes like this have often occurred before. Some of the finest specimens of

literature and some of the greatest efforts of statesmanship have escaped the attention of those for whom they were written and to whom they have been addressed, and sometimes, after a century of forgetfulness, they have been resurrected from their graves. This ought not to be the fate of the Senator's effort. It ought not to be its fate, because the thoughts it conveys are absolutely original. It has not a feature of imitation about it. It gives to the rising generation an entirely new conception of constitutional guaranties and places the Constitution in a light that it has never been placed before. With no hand to guide him, no beaten track to follow, and no example to emulate, the Senator has struck out for himself, and, to use a borrowed phrase, he has "floated serenely on the surface," absolutely unconscious of the unfathomed depths beneath. With dauntless and intrepid voice he has proclaimed the principle that whenever Congress believes that any of its enactments will accomplish some enumerated power of the Constitution, the belief of Congress settles the constitutionality of its legislation. It is not as Marshall said, "That Congress is the judge of the decree of necessity, and if the means are proper to accomplish any enumerated power, then the courts will not interfere with the discretion of Congress if adapted to the end." This is no longer the formula. No "such pent-up Utica" contracts the boundless aspirations of the Senator. If it is useful, if it is beneficial, says the Senator, then Congress is alone the judge of its constitutionality.

That I may not misquote the Senator from Nebraska, let me read, because it is only a few lines, his language upon this subject :

If the object of this bill is needed, or if it will be helpful, in the opinion of Congress, to regulate and promote commerce among the States, it is proper under the commerce clause of the Constitution. If it will be useful to the Government in borrowing money, it can be maintained under the clause authorizing Congress to borrow money. If Congress believes it would be beneficial in raising and supporting an army, it is constitutional.

Then all that it is necessary for us to do is to believe that the legislation we are enacting is constitutional, and that makes it constitutional beyond the investigation of the Supreme Court. It need not be necessary, it need not be proper within the language of the Constitution, it need not be the means adapted to the end, but if it is helpful, if it is beneficial, and we believe it is constitutional, that settles forever the constitutionality of the legislation. Transcendent thoughts!

Mr. President, should a discovery like this be permitted to die? It may die unless some steps are taken to save it. Some necessary and proper means, therefore, should be devised to rescue it from oblivion. The Senator alone has it within his power to accomplish this purpose. Transcripts and copies and duplicates of his constitutional discovery should be sent to every academy and college and university and seat of learning in the land wherever constitutional law is taught, so that some day, when this great edifice, with its broken columns and arches, may crumble into ruin, these imperishable utterances of the Senator from Nebraska shall endure and survive, "wrapped in the solitude of their own originality, immutable amid change, magnificent amid ruin."

THE ELECTION OF SENATORS BY DIRECT VOTE.

Popular election of Senators was a principle long advocated by Senator Rayner, and on February 27, 1911, he urged the adoption of a resolution submitting a constitutional amendment to this effect. He did not live to see this amendment ratified.

I ask the attention of the Senate just for a few moments to give the reasons why I shall vote for the joint resolution, submitting to the Legislatures the question of the popular election of Senators with the Sutherland amendment in it. I will not take long. I promised the Senator from Georgia I would not

take over seven or eight minutes. I will ask Senators kindly not to interrupt me.

Mr. President, I would rather not have the Sutherland amendment, and I opposed it with all my strength. It is now a part of the resolution; and the question with me is, Shall I vote for this resolution or against it with this amendment in it? I have reached the conclusion to support the resolution with the amendment. In the several arguments that I have addressed to the Senate upon the Sutherland amendment, I stated that I had not arrived at any conclusion as to whether I would support the resolution with the amendment incorporated in it. I also took good care to state that I objected to the amendment principally upon the ground that I did not consider it necessary, believing, as I still do, that Federal laws could be enacted by Congress to prevent violence, intimidation, or corruption at the polls without the Sutherland amendment as well as they could with it.

I am so strongly in favor of the election of Senators by the people that I can not possibly turn the proposition down because it contains a provision that might probably give rise to trouble in the future. We will be prepared to meet the trouble if it should ever come. Public opinion would not tolerate the passage of any measure similar to the force bill. I think that is a dead issue, buried beyond the chance of political resurrection. Nor can I, by my own vote, delay this great question until the next Congress. The vote may delay it, but I shall not and can not participate in that plan. I want to expedite it with all my might and strength. I have fought for this proposition for the greater part of my public career, and believe in it with all my heart. I consider that it will be the greatest political reform accomplished by the present generation.

The proposition that the people are incapable of selecting Senators seems to me too absurd for consideration. I have not a lingering fear of the incapacity of the people in this regard.

I would rather trust the people than trust the Legislature. Intelligence rules the day. If the people select an incompetent representative, then it is the people's fault, and it is not for us to criticise them.

The people want this change and they will have it. It is not the clamor of the mob. It is not the impulse of agitation. It is the deliberate and matured thought of the American people that the change shall come. Between the people and the Legislature, I prefer the people, and I would not want to hold my place here for a moment if I thought the popular sentiment of my State was against me. Legislatures are one thing, the people are another. Legislatures are sometimes controlled by political managers, and the people at this hour are in the humor of breaking the bonds of political despotism. The day of tyranny is over in this Republic. The rising generation is no longer being driven to the polls like cattle to the shambles, but is marching in unbroken phalanx with free ballots and ballots that are not for sale. From the ranks of labor and from our colleges and universities they come. They understand this question and demand that it shall be submitted to the Legislatures of the States. They will not tolerate the suggestion that has been advanced here, that they are too ignorant to decide it.

From whence comes this suggestion that the people can not perform the function of selecting Senators? I have hardly ever heard of it outside of this Senate Chamber. I am satisfied that this body contains a membership better equipped in point of character and ability to perform the important duties assigned to them than any other parliamentary assemblage in the world. But, on the other hand, I do not believe we will deteriorate if the people are allowed to make the selection.

I recognize the fact that this is a representative Government, but great changes have taken place since the adoption of the Constitution, and the greatest of all changes apparent now on the surface to the casual observer is that there should

be a closer relationship between the people and their public servants.

If the people have not the intelligence or the capacity to select their representatives, then we had better submit a constitutional amendment to change our form of government from a republic to a monarchy. If the people must have political slave-masters, let us invest them with royal power and hereditary prerogative. If the people are wanting in the qualifications requisite to select Senators, then, in my judgment, the Republic is a failure. Who says that they can not be trusted? We say so. Who has authorized us to say so? We are not the masters. We are the servants of the people, and if the States demand that this question should be submitted to them, in my judgment we had better no longer trifle with their appeal.

I am not influenced by passion or feeling, but my mind has kept pace, solemnly kept pace, with this mighty problem, and we can not prevent its consummation. We may impede it, we may delay it, we may throw obstacles in its path, we may obstruct it, but the day of reckoning and accountability will come.

I shall, therefore, support this resolution for two reasons: First, because I believe in it; and, second, because I know that the people want it. Either reason would be sufficient for me. Some Senator, speaking in opposition to this resolution and substantially repeating what another great Senator years ago had said who spoke in the same vein, observed that if we pass it we will wreck the Constitution and founder the ship of state.

Mr. President, the Constitution is subject to amendment. Fifteen amendments have been made to it, and I venture to say that no amendment that ever will be made to it will impair the spirit of the instrument. So far as the ship of state is concerned, it will weather the gale that has practically spent itself in this Chamber. It may be necessary to change pilots, it may be necessary to jettison a part of the cargo, the shores may be

strewn with stranded hulks, but armed and equipped with the manhood and the courage and the honor of the Nation, Mr. President, the ship of state is safe.

RELATIONS OF THE UNITED STATES, JAPAN AND MEXICO.

In this address, delivered in the Senate April 13, 1911, Senator Rayner opposed the idea that the Monroe Doctrine obligated this Government to collect a claim of an American citizen against a foreign nation either for redress or indemnity.

It is proper for me to state at the beginning of the remarks that I shall submit to the Senate upon the subject indicated in the resolution, that it is not my purpose in any way to criticise the President in reference to the position that he has taken in connection with the troubles in Mexico. I am satisfied that whatever he does will not only be necessary and proper to be done, but will, in his opinion, be for the best interests of the country. I have arisen simply for the purpose of emphasizing what ought to be familiar to everyone who is acquainted with the institutions of the land, and that is that the doctrine known as the Monroe doctrine is not involved in the Mexican situation in any way whatever. A great many persons of intelligence, and a number of journals ably edited, are falling into the error or supposing that, if there should be any disagreement between the United States and Mexico—which we all hope and believe there will not be—that the Monroe doctrine will form the basis of the controversy. I make the assertion that this is not true in any aspect of the case. I do not suppose that there is any subject that has been discussed before Congress to a greater extent than the subject that is designated as “the Monroe doctrine,” and I have upon a number of occasions, both in the House and in the Senate, contributed to the literature upon the question, so that I really feel that I ought not to

inflict even upon an attentive and patient body any further comments or observations in connection therewith. What I will say, if it serves no other purpose, will at least relieve the public mind of a false impression that is rapidly gaining ground, that whenever there is any controversy between the United States and any other country upon the American continent, the Monroe doctrine immediately and mysteriously springs into existence and calls for our assertion and vindication of the principles that it enunciates.

One proposition I desire to make perfectly plain and that is that we must not confuse or commingle in any degree the Monroe doctrine with the Roosevelt doctrine. During the reign of ex-President Roosevelt a lot of miscellaneous doctrines were launched upon the tide of time that were all called "The Monroe doctrine," but which, in point of fact, had no possible connection with it and were not related to it in any manner whatever.

The Roosevelt doctrine, properly defined, is the doctrine of the gentleman with the shillalah at Donnybrook Fair, "Whenever you see a head, hit it." The ex-President once upon a time composed a brief treatise upon the Monroe doctrine. This is not the work in which he referred to the men who helped to frame that governmental principle as "shifty doctrinaires, mediocre minds, and imbeciles." The treatise that I refer to is another publication, and it is extremely difficult to procure a copy of it. They seem to have all disappeared, either by the public taking them or owing to the fact that the President himself bought them all up, and thus withdrew them from public inspection. It is a treatise that the ex-President need not be ashamed of in any way, because he was writing about a subject that he knew all about, which was not always the case with reference to numerous other subjects to which he has upon a great many occasions devoted his great talents and ability. A few years ago, and long after this book was written Mr. Roose-

velt announced his new doctrine that I have referred to, and which, at the time, provoked the criticism of every lawyer at the American bar who was at all conversant with the principles of international law and amazed every statesman and diplomatic official in the civilized world. His doctrine was, that in the event that any of the States upon the American Continent refused, either from wantonness or inability, to perform their contractual obligations, that foreign nations, protecting their citizens who were creditors, could enforce the payment of those obligations through the instrumentality of war.

When I came to the Senate this new doctrine struck me with such appalling terror that I could not resist the opportunity of endeavoring to controvert it to the best of my ability in an address delivered to this body. The inference that the ex-President drew, in a message that he sent to the Senate, was in connection with the affairs of Santo Domingo. And he boldly and unhesitatingly proclaimed that if Santo Domingo failed to pay her debts the Governments of Holland and of Belgium, representing their citizens who were creditors, might collect those debts through the process of war, and that, therefore, the Monroe doctrine came into immediate operation, and the imperative duty devolved upon us to seize the custom receipts of Santo Domingo and divide them among her creditors in order to prevent the capture and occupation of her territory by foreign nations. I venture to say that a more grotesque interpretation of the Monroe Doctrine was never incorporated in any message that ever issued from the Executive chamber.

In pursuance of this mad policy—which, if there had been a spark of life left in the bodies of Jefferson, or of Adams, or Monroe, would have made them tremble in their graves—Mr. Roosevelt proceeded to carry it into execution, and after he had taken possession of the custom-houses of Santo Domingo and had collected their revenues and deposited them in a financial institution in New York, he gave the Senate the privilege of

maintaining what he was pleased to call "the *status quo*" between the United States and Santo Domingo.

Mr. President, such a *status quo* never existed upon all the pages of civilized or uncivilized history. I will not do myself the credit of claiming that my remarks at that time—during the course of which I cited an unbroken line of diplomatic and international precedents against the proposition contained in the message—had any influence whatever in making the ex-President modify the message a week or so afterwards, in which he denied that he ever meant to say that the failure to pay contractual debts was a justification for war. Of course, my contention was that the right to commence hostilities against a country never existed in a case of this sort, but was limited to cases where an unjustifiable trespass or tort was committed against persons who were citizens of the complaining government, or where they were in some way deprived of their liberties or international rights, and the government that had committed the crime persistently refused to make reparation, could not be obtained at the hands of its judicial system.

Let us look for a moment at what sort of wars we would have, if the Roosevelt construction of the Monroe doctrine were to prevail and were to be incorporated into our diplomatic code. We would have an interminable succession of bondholders and stock-market wars. War, instead of being declared by Congress, could be practically declared by the banking syndicates of London, Paris, Amsterdam, and Berlin, represented by their financial agents in America. We would become sponsors and guarantors for every bankrupt and impoverished government in Central or South America. We have never yet been informed as to what amount of money was made out of the Santo Domingo settlement, nor what was the price at which their bonds were sold before our intervention, nor what was the price that the holders afterwards obtained for them in set-

tlement of their claims, nor who was in the deal, nor who were the beneficiaries of our interference.

I would like to ask, in this connection, what right have any of our citizens to engage in enterprises in these countries, charge them the most exorbitant and extortionate prices for the construction of public works, and then demand of the United States that it must nominate itself as a receiver of the revenues of the government that they have practically driven into bankruptcy and liquidate its indebtedness? Where is there an intelligent person in the United States, who has studied the history and institutions of the country, who can draw the slightest parallel between this doctrine, first proclaimed by Mr. Roosevelt, and the doctrine that bears the name of Monroe, sustained by the names of Jefferson and of Madison and of Adams? The despots of Austria and of Russia and of Prussia, when they formed the Holy Alliance, whatever else may be said of them, were not mercenaries or hirelings. When they met at Aix la Chappelle and Laybach in conference, they had but one object in view, and that was to put an end to the system of representative government throughout the world, to destroy the liberty of the press, and to maintain the *jure divino* autocracies of Europe. Mr. Monroe wrote to Jefferson submitting the British proposals of Mr. Canning, and Jefferson, on October 24, 1823, answered from Monticello:

The question presented by the letters you have sent me is the most momentous which has ever been offered to my contemplation since that of independence. That made us a Nation. This sets our compass and points the course which we are to steer through the ocean of time opening on us.

Did he, in his prophetic mind, have the remotest conception that this great charter of republican liberty which he was helping to frame was to be used by buccaneers and speculators and adventurers to oppress the commercial liberties of the very State whose personal liberties it was supposed to guarantee?

I will not sit here in silence, with folded arms, and permit this revolutionary principle which was formulated and promulgated overnight by Mr. Roosevelt to be known by any other name except the name of the illustrious individual who first conceived it and put it into practical execution. I want to lift this cloud from around the brow of the rising generation. I want the students at our colleges and universities to understand that when they are discussing this proposition they are not discussing the Monroe doctrine or any corollary that flows from it in any manner whatever. They are simply discussing a doctrine that has received practical recognition at the purlieus of American brokers and speculators who deal in South and Central American securities and at the gambling dens of Amsterdam bankers and foreign stock markets. It is a disgrace and a degradation to connect this money-making enterprise with the imperishable names which, in tones that rang and re-echoed throughout the world, pledged forever the honor of this Republic to maintain the blessings of liberty in every quarter and section of the Western Continent where despotism had ceased to hold its sway.

We might let Mr. Roosevelt's doctrine rest where it is were it not for the fact that the ex-President has set some of the schools of this country almost deranged upon the subject. He has perverted the history of the Nation to such an extent that every day in the year, in answer to innocent communications that I receive, I am using my best efforts to relieve these young minds of the false impressions and confusion with which he has surrounded them. It is impossible for me to dictate letters to all of the attendants at all of the schools in the United States, telling them not to pay any attention to this new doctrine of the ex-President, and it is principally for this reason that I have arisen here today that I may say a few words that may possibly reach some of the victims whose future am-

bition he has imperiled by his heretic utterances upon this subject.

Let me read a few communications out of the many that I am receiving from some of these young men, for the purpose of illustrating the havoc and ruin that he has caused among the tender disciples of his school. Here is one of the letters:

Will you please tell me what stand, in your opinion, ex-President Roosevelt would take upon this Mexican question if he had a hand in it? I am in a debate upon the subject, and I would like to have any of his speeches that you can send me. I will try to work my way out of it if I can just find out how he stands and how you stand. I am so fond of reading his speeches and yours. They have the true ring in them, and they are very much alike.

Poor boy! He really thought he was paying me a compliment. I read a second communication:

Will you explain to me what connection the Monroe doctrine has with the case in Mexico? I have read Mr. Roosevelt's message on Santo Domingo, but I am mixed up about it—

No wonder.

What I would like to know is this: Suppose the Mexican people would turn their government into a monarchy, would we have a right to interfere?

This communication came just in time, and the question was a very intelligent and pertinent one. I sent this boy an observation of Mr. Dana's in a note to Wheaton, which happened to be in direct response to his inquiry. As it is only a few lines and covers the exact point that I am discussing here today, I will read the extract:

It has sometimes been assumed that the Monroe doctrine contained some declarations against any other than the democratic-republican institutions of this continent, however arising or introduced. The message will be searched in vain for anything of the kind. We were the first to recognize the imperial authority of Don Pedro in Brazil and of Iturbide in Mexico; and more than half of the northern continent was under the scepters of Great Britain and Russia; and those dependencies

would certainly be free to adopt what institutions they pleased in case of successful rebellion or of peaceful separation from their parent states.

The third and last communication that I will read is as follows:

We have the Mexican question up for debate next week. I would like to know how does the Monroe doctrine get into it?

So would I.

Did Mr. Roosevelt pass any laws of Congress, when he was President, on the subject? I would like to have your private opinion on the following question: If Mr. Roosevelt was in charge of Mexico, what do you think he would do with the United States? I am on the affirmative.

Then there is a postscript as follows:

Please send me Senator HEYBURN's speech in which he said that the people who were in favor of electing United States Senators by the people could not spell his name and most of them could not spell their own names. Also let me have Senator BOURNE's speech, and kindly let me know whether Mr. Roosevelt is a member of the new party that is now being made up.

I have selected these few communications from among hundreds of similar ones to show how students who are trying to familiarize themselves with the political history of the country have had their minds perverted and prostrated upon some of the great and imperishable principles that underlie our institutions. I want now to announce to them in such unambiguous terms that they can not be misunderstood, and which will perhaps obviate the necessity of my answering a number of communications in the future, that our present movement or maneuvers in reference to Mexico have not the slightest relation to or bearing upon the Monroe doctrine. I will again give them an extract from President Monroe's message, from which the doctrine receives its name, which practically carries the entire subject with it:

In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do. * * * We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered, and shall not interfere. But with the governments which have declared their independence and maintain it and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them or controlling in any manner their destiny by any European power in any other light than as a manifestation of an unfriendly disposition towards the United States.

On March 25, 1825, Mr. Clay, who was then Secretary of State, transmitted to our minister at Mexico a communication, from which I quote the following lines:

The political systems of the two continents are essentially different. Each has an exclusive right to judge for itself what is best suited to its own condition and most likely to promote its happiness, but neither has a right to enforce upon the other the establishment of its peculiar system, and you will therefore urge upon the Government of Mexico the utility and expediency of asserting this principle on every proper occasion.

On October 21, 1858, Mr. Cass, Secretary of State, sent to our minister at Spain a communication, from which I will also quote a few lines, as follows:

With respect to the causes of war between Spain and Mexico the United States have no concern and do not undertake to judge them. Nor do they claim to interpose in any hostility which may take place. Their policy of observation and interference is limited to the permanent subjugation of any portion of the territory of Mexico, or of any other American State, to any European power whatever. The American Minister is authorized to say that the United States considered Mexico's freedom from foreign control to be essential to the true policy of the independent States of America, and that any attempt to subdue or hold possession of that country would be considered by the United States as an unfriendly act and would be firmly opposed by them.

We all know what occurred with Mexico a little later on; and while I do not at all depend upon our action in that contro-

very as a precedent for what we ought to do if a similar occasion and emergency presented itself today, I want to read only a few lines of an instruction sent by Mr. Cass to Mr. Robert M. McLane, who was then our minister in Mexico :

While we do not deny the right of any other power to carry on hostile operations against Mexico for the redress of its grievances, we firmly object to its holding possession of any part of that country or endeavoring by force to control its political destiny. This opposition to foreign interference is known to France, England and Spain, as well as the determination of the United States to resist any such attempt by all the means in their power.

And I will close references upon this point by reading a resolution passed by the House of Representatives, without dissent, on April 4, 1864, as follows :

That the Congress of the United States are unwilling by silence to have the nations of the world under the impression that they are indifferent spectators of the deplorable events now transpiring in the Republic of Mexico, and they think fit to declare that it does not accord with the policy of the United States to acknowledge any monarchical government erected on the ruins of any republican government in America under the auspices of any European power.

Now, while volumes have been written upon the subject that I have been discussing, I have read a sufficient number of extracts to satisfy anyone who has a grain of sense or intelligence in these United States of America that whatever the Mexican situation may be, the Monroe doctrine, as such—whatever the Roosevelt doctrine may be—does not at any point come in touch or contact with it, and that there is not now the remotest danger—and there never will be, in my judgment—that any government on this earth will ever attempt to subvert the Republic of Mexico and upon her ruins erect monarchical institutions.

It is said, however, that the property of American citizens may be in jeopardy and in danger in the Republic of Mexico, and that they are entitled to the protection of the United States.

In explanation of this suggestion, I would state that the Department of State, presided over by the Secretary of State, and not the Department of War, presided over by the Secretary of War, has jurisdiction and supervision over this matter. The State Department has adopted certain regulations upon this subject, which are in the hands of our diplomatic officials. They must be strictly followed whenever a claim of a citizen of the United States for redress or indemnity may be diplomatically presented to a foreign government.

The Army of the United States is not an agency for the collection of private debts. I have no greater right, if I were a citizen of the United States living in Mexico, to call upon the Army of the United States to collect a claim either for redress or indemnity against the Government of Mexico than I would have a right to call upon the Militia of the State of Maryland to collect a sum of money that may be due me by the State upon public obligations. I am sure this is the opinion of the President. If any syndicate of mine owners, or any rubber companies, or Standard Oil interests should at any time suffer any injury to their possessions or acquisitions, they have no greater rights than the humblest individual whose property has been injured or destroyed.

And I want, in this very connection, to quote a few lines from a communication of Mr. Seward to our minister at Colombia upon this subject, sent to him in April, 1866. In this communication Mr. Seward says:

We are, unfortunately, too familiar with the complaints of the delay and the inefficiency of the courts in the South American republics. We must, however, continue to repose confidence in their independence and integrity, or we must take the broad ground that these States are like those of oriental semi-civilized countries—outside the pale within which the law of nations, as generally accepted by Christendom, is understood to govern. The people who go to these regions and encounter great risks in the hope of getting rewards must be regarded as taking all the circumstances into consideration, and can not with reason ask their government to complain that they stand on a common footing

with native subjects in respect to the alleged wants of an able, prompt and conscientious judiciary. We have not undertaken to supervise the arrangements of the whole world for litigation because American citizens voluntarily expose themselves to be concerned in their deficiencies.

Of course, Mr. President, I know full well that if the liberty or the personal rights of our citizens in Mexico or anywhere else are interfered with, or their property wantonly destroyed at the hands of revolutionists or other forces, and the government in which the trouble occurs is either unwilling to protect them, or has not the power to do so, that we need not stand idly by. We have the right, and it is our duty, to resort to various methods plainly recognized by the usages of international law for the purpose of affording proper protection to the rights of our citizens.

I come now, briefly, to a subject in connection with my remarks that is of great interest to us, and that is the relation between the United States and Japan, that seems to have been brought into prominence by the Mexican situation.

I want to premise what I propose to say upon this subject by the statement that it is my own positive conviction that there is no danger, presently or remotely, of any war between Japan and the United States. The United States certainly has no idea of even preparing the way for hostilities against Japan, because there is no cause for such a procedure. Japan has no grievance against or controversy with the United States that can not be amicably settled upon the field of peace. It is true that Japan might take certain steps with Mexico that would arouse our suspicion and perhaps furnish cause for investigation. I am not an idealist or a visionary in matters of this sort. But why these countries should go to war it is impossible for any one to understand outside of military circles and inflammatory journalists. What is the *casus belli*? The immigration question or the school question in San Francisco? It is too absurd to contemplate that such a proposition that can

be settled by treaty and the good sense of the American people should ever become the occasion for war. It is, however, boldly proclaimed that Japan wants to control the Pacific Ocean from Capricorn to Cancer, and in time of war hold it against the world. How absolutely ludicrous is this proposition! I know the spirit of the Japanese people pretty well, and when I speak of the people of either country I am not speaking of the mob, but of the intelligence and patriotism of their representative elements.

The people of Japan constitute a marvelous and courageous race. They have lately concluded a war in which they were animated with a spirit of lofty heroism, daring valor and ambitious sacrifice hardly paralleled upon all the pages of history, and they emerged from this war victorious in every battle upon the land and on the sea. I am willing to admit that, if Japan is entering into negotiations for coaling stations and bases for naval supplies for military purposes with Mexico, we are entitled to know what these negotiations are. Congress is, however, without any information or evidence upon the subject. This country would not ordinarily be entitled to know the secret treaties or alliances that other countries may make, but upon the part of Mexico we would unquestionably be entitled to an explanation.

I have no fear that history will repeat itself, or that any Government would attempt to imitate the example of Napoleon III, who, through false pretenses and subterfuges, sent an Austrian archduke to a Mexican throne, simply to abandon him afterwards to despair and death.

It is also stated that the situation at Guam is threatening and gives evidence of an intention on the part of Japan to prepare for hostilities. Guam is one of our princely volcanic possessions in the Pacific, bequeathed to us by the Spanish War. It is one of the Ladrone Islands, or "island of thieves," thus named because when they were discovered the art of stealing

from each other was the principle industry and delightful occupation of their inhabitants. Guam is about 5,000 miles west of San Francisco and about 1,342 miles from Yokohama. It was brought into captivity as a maritime prize by the American cruiser *Charleston*, which, with a single shot, leveled its formidable battlements and took possession of this volcanic eruption in the name of the United States. The old Spanish Governor, who had been there from time immemorial, was under the impression that the Americans were saluting him and appeared on the deck of the ship to tender his apologies for not having any powder with which to return the compliment. He never discovered the terrible state of affairs until the Spanish colors were lowered from the parapet and the colors of the Union floated in triumph over this priceless gem of the sea.

Guam is a charming spot, and one of the most lustrous and brilliant jewels in our oriental galaxy. Its principal products are vipers, snakes, lizards, wild swine, rats, and castor oil, and if the island were put up at auction today, with all of the inhabitants in it, beyond its value as a military post, it would not bring a dollar and a half in any of the markets of the world. It must not be lost sight of, however, that Guam is the key to communication upon the Pacific Ocean and the relay point for cables to Manila, Tokio, and San Francisco. It is necessary to relay messages to Guam, because of the resistance which the submarine current encounters in its journey from Honolulu, and if Japan ever came into possession of Guam we could be cut off from communication with the Philippines, except by way of the Azores and the Suez route, and thence to the Indian Ocean.

So far as I am concerned, I would not care, if we could bring our own citizens home, whether we would be cut off until all eternity, from any further communication with the Philippines. I would have permitted them to go long ago. Those

of her inhabitants who are civilized, I would permit to remain civilized; those who are uncivilized, I would permit to remain uncivilized. Perhaps they are happier when they are uncivilized than when they are civilized. I do not believe this Government is an institution for the feeble-minded nations of the earth.

I shall not refer to the dreadful mistake we made in reference to the Philippines. All the pages of history, ancient, mediæval, and modern, do not record such a stupid and stupendous blunder. It is said that Japan wanted these islands. Never on the face of the earth in the way that we wanted them. What Japan might have desired was what we ought to have been satisfied with, and that is, a military base for war vessels and naval supplies and for coaling stations, and what we ought to have done was to have made the terms for such an occupation and then sailed away in triumph, satisfied with the victory we had won. Does anyone believe that Japan would have burdened herself with the government of the entire Philippine group or would have been willing to incur the outlay necessary for that purpose? Our victory has been turned into a policy of disaster and sacrifice. It is said that we can not part with them now. Why not? Could we not reserve sufficient space upon this territory to give us a landing place for this great war that is looming up upon the horizon and illuminating the waters of the Pacific and the lurid imagination of some of our great sea captains who, if this war is not hastened, may be upon the retired list before they will be afforded an opportunity of practicing their profession upon their fellow-man? The only person that I know of who will perhaps object to this arrangement is the Sultan of Sulu, who is our principle subject in the orient. It will be a national calamity for us to lose this loyal liegeman. He might some day be a Senator of the United States; in fact, I think he ought to be one now. The question is, whether he would be willing to ex-

change his gilded manacles and his salary for liberty. It is true that we have civilized him to some extent. When he became our captive he was a very pious and devout person, who spent all day Thursday praying in the mosque, and the balance of the week he devoted to piracy, murder, and other gentle and respectable amusements. He was then in possession of three kinds of wives. The first-class ones lived in his palace, the second schedule abided with their mothers-in-law, and the third indulging in a fluid decoction that forms one of the delightful beverages of that charming region, spent most of their festive and hilarious hours in jail.

Mr. President, I shall be glad when we can ring down the curtain upon this comedy and tragedy and when the whole performance shall end and this Government shall divest itself of a possession that has been a curse and affliction to us from the day that we tasted this forbidden fruit.

As it is, I suppose we must defend the Philippines as a matter of sentiment, and, therefore, it is of some importance to us to find out whether the Government of Japan has undertaken to lay its own cable to Guam, because if it did so it simply had no right to take this step without our consent. The law of submarine cables between foreign Governments and the United States has been well established, and I desire to read just a few lines, to show what the law is upon the subject. On May 11, 1897, there was an application by "The French Company of Telegraphic Cables" for permission to lay a cable between Brest and Cape Cod, and in answer to this request the State Department replied as follows:

It is the expectation of the Federal Government that the French Cable Company will take no steps toward laying its proposed cable from Cape Cod without express authorization of the President or of Congress, before which a bill was introduced which has not yet been enacted into law. If that company should, however, take action in the manner proposed, it is proper to say that it would do so at its peril.

And the Attorney General, sustaining the State Department, decided—

That the President has the power, in the absence of legislative enactment, to control the landing of foreign submarine cables. He may either prevent the landing or permit it, if the rights entrusted to his care so demand or permit it. If a landing has been effected without the consent or against the protest of this Government, respect for its rights and compliance with its terms may be enforced by applying the prohibition to the operation of the line unless the necessary conditions are accepted and observed.

Under the usages and principles of international law, Japan would clearly have no right to lay a cable to Guam or to any other possession or territory of the United States without our consent. I do not believe that Japan has been guilty of this act, because its advisers and counsellors are men who are too well informed upon the principles of international usages to permit such an intrusion and violation to occur.

I am, therefore, of the opinion, from what I have said, that there will be no war—no war with Japan, no war with Mexico, and no war with any other nation that I know of. Of course, agitation will create uneasiness and alarm. Before the commencement of the Spanish War the proprietor of one of the most prominent newspapers in this country received a message from his correspondent in Cuba, "There will be no war." He telegraphed back to his representative, "You furnish the news, and I will furnish the war." There was cause, however, for the Spanish War. That war had to come, and Spain had to be driven from the shores of the Western Continent.

I have observed within the last few days that the German Chancellor in the Reichstag, following his earlier utterances upon the same subject, gave expression to this sentiment in connection with the general subject of peace and war that I have been discussing today. He said that—

The difficulty in a disarmament agreement is the impossibility of supervision of individual States. The control over these I regard as

absolutely impracticable. The mere attempt to control would have no other result than continual mutual distrust and universal turmoil. It will remain true that the weak will be the prey of the strong. If any nation feels that it is unable longer to spend certain sums for defensive purposes, it will inevitably drop to the second rank. There will always be a strong one ready to take its place. General disarmament is an unsolvable problem as long as men are men.

I would change this by saying that "general disarmament is an unsolvable problem as long as men are savages." Of course, Germany is a great military power, and its history has been one of war and conflict and strife, and its people, besides their historic deeds of valor, are intellectually and morally as great a race as there is on earth, either in the arts of war or in the arts of peace. This sentiment of the Chancellor would, I apprehend, have met with universal recognition during all the centuries, from the time the Cimbri and the Teutons came out of their northern forests to ravage the fields of Italy until the time that the German hosts made their triumphant entry upon the streets of Paris. I doubt, however, whether this declaration at this hour meets with the approval of a vast number of the Emperor's subjects, and I know it does not reflect the wishes and the hopes of an advanced civilization. Of course, there can not be a general disarmament if Germany declines to enter the list. I believe, however, the day is bound to come when Germany will yield if all the races of the civilized world consent to the adoption of such a policy, and the action taken in the Reichstag gives promise in that direction.

I believe the time will come when war will no longer be indulged in, but will only be read of as one of the crimes of a barbarous age. Nations can be civilized in some respects and barbarous in others. History affords us numerous examples of this sort, and, while we are gradually becoming more and more enlightened and advanced, we still cling to this brutal method of adjusting our differences. If an individual offers an insult

to another, no matter how atrocious it may be, and the insulted party calls for a retraction, which is refused, and then declares war upon the offender and punishes him in fair and open combat, it is an offense that society condemns, and it inflicts its penalties lightly or severely, according to the degree of injury sustained. But if a nation—that is to say, a multitude of individuals—offers an indignity, no matter how slight it is, to another nation and does not make reparation therefor, the nation that is offended, according to our present code of international morals, has the right to open hostilities. Slaughter and violence upon the enemy are not only justified, but become acts that every true patriot who loves his country should take a hand in and be proud of, as a heritage to transmit to his descendants.

If two individuals enter into a contract and afterwards disagree about its proper interpretation, we have appointed tribunals to settle the controversy between them, and it would be rather a novel sight to witness one of them attempting to enforce his construction of the agreement upon the other at the point of the bayonet. But if two enlightened, God-fearing governments enter into a treaty and the one should happen, according to the judgment of the other, to violate it, society has concluded that the only cure is to sacrifice human life and to keep on sacrificing it until one party or the other, through sheer exhaustion of its resources and vital energies, is compelled to admit that it has made an error in its version of the compact. If an individual happens to appropriate property that belongs to another, we have ordained a method by which the wrong can be speedily redressed. But if a great nation, by a stroke of diplomacy or statesmanship, as it is called, steals a country thousands of miles away from its borders, that some other nation claims to have stolen years before, there is nothing except bloodshed that can determine who is the lawful thief. In the settlement of this contention it is highly proper and com-

mendable for both sides to massacre and exterminate the unfortunate natives whom Providence has planted there as the rightful possessors of the disputed territory.

Of course, under existing conditions it may be proper, Mr. President, in time of peace prepare for war. A number of intelligent persons are of the impression that ex-President Roosevelt was the first one who ever gave this advice. They forget that Washington, in his address to both Houses of Congress in 1790, said:

To be prepared for war is one of the most effectual means of preserving peace.

It was perfectly proper to give this advice at that time. Washington, however, was not the first one who made this suggestion. Upon the armories of Venice there is this inscription:

Happy is that State which in time of peace thinks of war.

Long before this, in the Satires of Horace, there is found the expression:

In peace, a wise man should make suitable provision for war.

This barbarian motto, therefore, is not original with Mr. Roosevelt. I would like to reverse it. Instead of saying, "In time of peace, prepare for war." I would say, "In time of threatened war, prepare for peace."

Speaking for myself, I am for peace and not for war. I believe the time is approaching when the science of war and standing armies, and navies patrolling the waters of the world, and death-dealing projectiles, and human sacrifice, and cities ruined and fertile plains made barren by the marauder's torch, will rank among the dark deeds of the past. I look for the advent of that day, and feel with all my fervent hopes and aspirations that it can not be long delayed. "Man's inhumanity to man" has made the "countless thousands mourn," and broken hearts and homes made desolate and agony and anguish and despair can not forever plead in vain. This inhu-

man and sanguinary method of settling international controversies must cease, and murder, though clad in martial pomp, must call a halt. Nations must no longer be brutes and savages, and the worshipping world must realize that it is profaning the altars of its faith when it not only sanctions but commends and exalts and participates in the practice of a policy which, heading the whole calendar of crimes and embracing every single one of them, is "an utter mockery of religion's holiest offices and bids defiance to the providence of God."

GENERAL ARBITRATION TREATIES.

On August 3, 1911, Secretary of State Philander C. Knox concluded a treaty between the United States and Great Britain for the submission of all justiciable questions arising between these countries to the Permanent Court of Arbitration at The Hague for settlement. On January 16, 1912, Senator Rayner addressed the Senate in support of the pact.

I occupy a rather unique position in relation to the subject that is before us. I am in favor of the treaties as they stand, and regret to say that I differ with a large number of my party colleagues in the position I have taken. I shall interpose no objection, however, to the supplementary provision that it is proposed to embody in the formal ratifications by the senior Senator from New York, but, possessed as I am with the firmly rooted idea that there are no constitutional or other legal objections to the adoption of the treaties, I feel it my professional and solemn duty to give my views upon the subject to the Senate for whatever they may be worth. When I say my professional duty, I mean it is my duty to the profession of which I am a member to announce my opinion in opposition to some of the arguments that have been advanced against the treaties; and when I say my solemn duty, I mean that, in my judgment, this is one of the most important subjects

that has ever been brought to the attention of the Senate of the United States, and it should invoke our grave and serious consideration.

I understood from the public press, which always in some mysterious way and by some incomprehensible and miraculous process obtains a most precise and accurate account of what transpires in the secret chamber and executive sessions of the Committee on Foreign Relations and of the Senate, that the Department of State has agreed to accept the proposition embodied in the resolution of the Senator from Massachusetts. If this information is correct, I think a great mistake has been made, and one which I fear may be fatal to the purpose contemplated by the treaties and to the international policies that they are supposed to effectuate. I may not convince anyone in the argument that I am about to advance, but if I can succeed in shedding a little light upon the intricacies of the complicated problem before us, I shall be perfectly satisfied with the accomplishment.

I know I am in the minority, but I have been in the minority before. Those of us who believe in the treaties may derive consolation from the fact that almost every protest against existing things, every crusade against oppression and superstition, every revolt against the practices and usages of barbarous ages, has been started in the camp of the minority and blazed its way upon its lonely pilgrimage in spite of the opinion of mankind.

I have stated in the minority views that I have submitted to the Senate that I shall not discuss the general merits of the controversy. It is my purpose now to present the legal and constitutional aspect of the matter, and without any further preface I shall, therefore, proceed to the discussion of the subject from this standpoint.

The first question that addresses itself to the Senate is

whether the decision of the joint high commission is conclusive, or whether we have the right to reject, modify, or amend it. Upon this branch of the inquiry I agree with the majority of the committee. I must interpret the treaty as it stands, unaided by any verbal explanations, as to what it was intended to mean. If it was intended that the decision of the joint high commission should not be a finality, there would not have been the slightest difficulty in so expressing it and inserting in the treaty a clear and unambiguous provision that after the decision of the joint high commission it could then be reopened in the Senate for its acceptance or rejection. This is the vital proposition in the treaty, and its construction in this regard ought not to be surrounded by the slightest uncertainty. This point, therefore, ought to have been made so plain in the treaty that there could be no difference of opinion upon it. I am compelled to treat the decision of the commission as a finality under the wording of Article 3, just as a majority of the committee construes it; and so treating it and standing upon this basis and being in favor of accepting the decision of the commission as binding upon the Senate, I shall contest as best I can the legal propositions advanced by the majority of the committee against the adoption of the treaties. The majority report rests substantially upon two propositions.

First. That in giving the commission power to decide what is justiciable, according to the principles of law and equity, we necessarily confer upon it the power to leave to arbitration, great governmental and constitutional questions which this Government would be unwilling to arbitrate with any nation in the world.

Second. That the Senate, in giving this power to the commission, is delegating to the commission a constitutional function which it has no right to divest itself of.

Under the first proposition, let us look at what differences between the United States and Great Britain shall be submitted

to arbitration. These are the conditions, and it is extremely important that they should be understood.

First. It must be an international matter about which the parties are concerned.

Second. There must be a *claim of right* made by one party against the other.

Third. The difference *must be justiciable*.

Fourth. It must be susceptible of decision *by the applications of the principles of law or equity*.

The majority of the committee say :

In England and the United States, and wherever the principles of the common law obtain, the words "law or equity" have an exact and technical significance, but that legal system exists nowhere else and does not exist in France, with which country one of these treaties is made. We are obliged, therefore, to construe the word "equity" in its broad and universal acceptance as that which is "equally right or just to all concerned; as the application of the dictates of good conscience to the settlement of controversies." It will be seen, therefore, that there is little or no limit to the questions which might be brought within this article, provided the two contracting parties consider them justiciable.

I regret I can not acquiesce in this view, and this part of the subject deserves a little deeper investigation than is devoted to it by the majority of the committee in the few sentences I have quoted. It is perfectly true that in England and the United States the words "law and equity" have an exact and technical significance, and that the legal system known as "law and equity" does not exist in France or in any of the continental countries of Europe, but it does not follow by any means that under the term "equity" there is no limit to the questions which might be brought within the treaty. The principles of equity were well recognized in the early systems of Roman jurisprudence. The Prætorian edicts were partly in the nature of equitable decree and the Prætor occupied a position similar to that of the Lord High Chancellor of England.

During the reign of Hadrian, these orders and decrees of the Prætor were abolished, but from that time, to the codification of the institutes of Justinian, equitable principles had a well-known place in Roman jurisprudence, under the various laws that were from time to time in vogue. In the institutes of Justinian the division between strictly legal and equitable principles is clearly defined, and from these institutes are derived equitable doctrines and principles that make their appearance in the different systems of jurisprudence that exist in the continental countries of Europe, although there is no separate system of equity as distinguished from that of law. The treaty employs legal phrases, and they must be given a legal definition.

If there should be a controversy between Great Britain and the United States, there is no difficulty about defining what "law and equity" means. If a controversy should occur between France and the United States, France having no separate system known as "equity," the treaty reading "law or equity" it would, in my judgment, be construed to mean any difference that is justiciable by the principles of law that prevail in France, the principles of law necessarily embracing the principles of equity in France, although in practice there are no separate systems of law and equity. I can not, therefore, give the word "equity" the definition that the majority of the committee accords it, which practically means every difference that might arise unlimited and unconfined between the respective countries. The words "claim of right," in the treaty, settle this construction that I contend for, because this is the usual phrase applicable to proceedings in equity. "Wherever there is a right, there is a remedy," is a familiar maxim to the profession, and it means whenever the common law did not give the remedy, equity would provide it. The framers of this treaty had no idea of using the word "equity" in the sense that the majority of the committee use it. The treaty with France is in identical terms with the treaty with Great Britain,

and, according to the rule that invariably governs the interpretation of treaties, exemplified in the Russian treaty which followed the treaty with Prussia as a standard, the treaty with Great Britain having been first prepared, the words "law or equity" would mean in France just exactly what they mean in England; that is, they would embrace the whole civil jurisprudence of France.

Mr. President, I am willing, however, to give it any definition that the committee desires, and I say, under the broadest latitude that may be afforded to the phrase "equity," it can not possibly cover the cases that seem to fill the mind of the majority with fear and forebodings as to the future. Let us look at this. Take the question of immigration. Is this a claim of right? Is this question susceptible of decision by the application of the principles of "law or equity," giving equity the broadest signification? Who could seriously contend for such a proposition? What are the decisions upon the subject? I am not now composing a flippant article in the Outlook. I am not laying down a set of rules that govern the altercations of the prize ring. I am trying to arrive at a proper interpretation of this treaty, and I assert that the whole subject of immigration is just as much an inherent power in any government as is the power of eminent domain, and can not possibly become a justiciable question. Let me give you the language of the Supreme Court upon the subject:

The power of the Government of the United States to exclude foreigners from the country, whenever in its judgment the public interests require such exclusion, has been asserted in repeated instances and can neither be granted away nor restrained even by treaty. Whether a proper consideration of previous laws or a proper respect for the nation whose subjects are affected ought to have qualified the inhibition, are not questions for judicial determination. If there be any just ground of complaint on the part of the foreign Government, it must be made to the political department, which is alone competent to act upon it.

The power to regulate immigration is an incident of the sovereign right to expel or exclude objectionable aliens. The exercise of the

power in a particular country is governed by the constitution and laws. In the United States it belongs to the National Government as part of its power to regulate commerce.

It is an accepted maxim of international law that every sovereign nation has the power, as inherent to sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe. (Vattel, lib. 2, secs. 94, 100; 1 Phillimore, 3d ed., ch. 10, sec 220.) In the United States this power is vested in the National Government, to which the Constitution has committed the entire control of international relations in peace as well as in war. It belongs to the political department of the Government, and may be exercised either through treaties made by the President and Senate or through statutes enacted by Congress. (The Chinese exclusion case, 130 U. S., 581, 606-611; Nishimura Ekiu v. United States, 142 U. S. 651, 659; Knox v. Lee, 12 Wall., 457; Fong Yue Ting v. United States, 149 U. S., 698.)

Now, let me ask how is such a subject that belongs to us and to Great Britain and to France, and belongs to each of them alone, to constitute a *claim of right* against each other, justiciable according to the principles of law or equity, giving equity the greatest latitude of construction?

We now come to the next objection. It is said the treaty might involve us in a liability for State debts. The very language of the treaties is, that it must be a *claim of right* that one of the contracting parties has against the other. Let us take the case of indebtedness by foreign creditors, represented by their government, against one of the States. Is this a *claim of right* against the United States? Is the United States obligated to pay the debts of the States? Where is there anything in the Constitution of the United States that permits us to assume the obligations of the States? Where is there any principle of international law or of treaty stipulation that gives a foreign government *the right* to look to the United States for the payment of a State indebtedness? Senators, how can such a question be left to arbitration when there is no possible question to arbitrate and no *claim of right* resting upon any foundation whatever against the United States?

We come now to another objection. The Monroe doctrine is to be left to arbitration. Just think of it! If any country should repeat today what France did about half a century ago, when Napoleon III appointed an Austrian archduke to a Mexican throne, and attempt to plant a monarchy upon the ruins of republican government upon this continent, is that a question to be arbitrated according to the principles of law and equity, according to the majority report? The Monroe doctrine has stood for nearly a hundred years, until today it is as firmly established as the Declaration of Independence and recognized and conceded by the civilized world! How can it possibly involve a claim of right to be adjudicated by the principles of equity, even if equity means what the committee says it does? Just think of the Government of Great Britain, for the breach of the Clayton-Bulwer treaty, which I think was dead and buried 30 years before the Hay-Pauncefote treaty was ratified, or under any treaty or for any cause whatever, dispatching its vessels of war to the Central American coast and sending a scion of its royal house to erect a throne in the Republic of Panama. Still, this is what the Monroe doctrine means, and what the learned Senator from Massachusetts, who is great upon every field of statesmanship, believes in his report could be held to be arbitrable according to the principles of law and equity. Mr. President, I shall not in the discussion of a great question like this be frightened by specters and phantoms that fade into a dream the very moment that the light of analysis is thrown upon the scene.

It is suggested, however, if the commission should undertake to decide a question of this sort to be arbitrable, what will the Senate do? Assuming the decision to be final, and I am assuming it to be final, what will become of us if the commission sends it to arbitration? Admitting that it is not within the terms of the submission and conceding that if the commission undertakes to decide it, that it is proceeding beyond its juris-

diction, still how will you impeach the action of the commission if it proceeds beyond the boundaries of its power?

In order to properly determine this, it is absolutely necessary to see exactly what the method of procedure is under the treaty.

In the first place, if the President concludes that the difference is justiciable, then under Article I, by and with the advice and consent of the Senate, the special agreement can be made submitting it to the permanent court of arbitration at The Hague or to some other arbitral tribunal. It will be observed that if either the President or the Senate conclude that it is not justiciable, then it is not submitted to the court of arbitration, but it is referred to the joint high commission. I ask now, in all candor, does anyone here believe that either the President or the Senate will submit the Monroe doctrine, or the immigration question, or the indebtedness of States, or any constitutional matter, or any question affecting the integrity of our institutions to *an arbitral tribunal*? I have not the slightest conception that any President of the United States, at any time, whoever he may be, or to whatever party he may belong, will ever venture upon such a hazardous and ruinous undertaking. If he should attempt it, I have not the slightest apprehension that any Senate of the United States that will ever be assembled, would give its advice and consent to such a proceeding.

This brings me to the second proposition, and that is, that if, in the language of the treaty, the parties disagree as to whether or not a difference is subject to arbitration, what becomes of the controversy? It is then submitted to the joint high commission. Does anyone here really believe for a moment that any of the commissioners appointed on behalf of the United States would hold that these great subjects that I have alluded to or any subject of a kindred nature is *justiciable* and

susceptible of decision according to *the principles of law or equity?*

This brings me to the third proposition, and here is where the difficulty occurs. If two of the members of the commission appointed by the United States should so far humiliate themselves before their country, and should so far forget the functions of the places to which they have been assigned and, utterly unmindful of their jurisdiction, should agree to refer to arbitration a question that *is not justiciable, which is not a claim of right* and which is *not susceptible of decision* by the *application of the principles of law and equity*, what is then the situation? I have taken the stand—and I can not divest myself of the process of reasoning that has led me to take it—that in such a case, an utterly *imaginary* and *impossible one*, the Government of the United States and its legislative department and the treaty-making power would ignore the decision and reject and repudiate it. It is said in answer to this that the Senate has no right to repudiate it even in these particular cases which have given rise to such a degree of anxiety upon this floor. In reply to this, I say that such a contingency will never take place; that it can not take place; that no commission would ever undertake to assume jurisdiction of questions like these; and that no American commissioner that would ever be appointed by any President, would ever dare to participate in such a decision. If such a decision, however, should be rendered—which is a purely hypothetical case, and in my judgment, beyond the realms of reason—then the President and the Congress of the United States would peremptorily decline to be bound by the judgment. Let me illustrate this. Suppose that the commission should send to arbitration the question whether the United States had the right to enact immigration laws, and thus attempt to sap and undermine the foundations of sovereignty, and our American commissioners, acting under some hallucination, should acquiesce in the decision, what would the

result be? The President and the Senate and the House of Representatives would immediately say to the commission, "You have gone so far beyond the limits of your jurisdiction that we shall never acquiesce in your decision." If any court of arbitration should ever undertake to decide a question of that sort, which is also an utter impossibility—not an improbability, but an impossibility—then we would decline to recognize its awards, and Congress, not the Senate alone, but Congress, under its constitutional power, would resist to the last degree the enforcement of it. I have dwelt upon these points because I want to demonstrate to the Senate, if I can, that, from any standpoint of law or equity or reason or common sense, there is not the remotest probability in the world that the obstacles that are created in the report of the majority will ever be brought to the point of practical execution.

We come now to the last objection that has been urged against the treaties—that is, that the Senate in giving the commission the power that it is invested with, is delegating its constitutional functions. If this were true, of course, there would be an end of our right to make the treaty. The Senate can not delegate its constitutional functions to anyone. Is it doing this? Why, Mr. President, the proposition answers itself, "*res ipsa loquitur*." Could the Senate consent to a treaty of arbitration today and provide *in the treaty* that before an award is rendered *the arbitrators should have the right* to determine whether the subject is a justiciable one? Is there any doubt about that proposition? Does anyone believe that this would constitute a delegation of the treaty-making power? Does it not follow with irresistible logic, as a proposition of law, that if we have the right to give the arbitrators themselves the power to determine whether a controversy is justiciable, that we have the right to give it to an independent tribunal?

I ask every member of our profession upon this floor to state what is the difference in law, so far as the delegation of power

is concerned, whether we confer it upon the arbitrators themselves or upon a distinct tribunal to determine? If we gave this commission the right to make a treaty for us, then we would be delegating the treaty-making power, and our proceeding would be unconstitutional, but *we are making the treaty now*, and we are incorporating in the treaty a provision against which there is no constitutional objection. We are not only doing this, but we are giving this commission the standard and the rule to guide them, which is, "Can the question be decided according to the principles of law and equity?" It is the same power precisely that we confer upon the Interstate Commerce Commission, and the Supreme Court has just passed upon its constitutionality. We enacted a law that railroad rates must be reasonable and non-discriminatory, and under that rule empowered the Interstate Commerce Commission to fix the rates. If we had given to the Interstate Commerce Commission the general power to fix rates without giving it the rule, then we would have been delegating our legislative power. We are doing in this case precisely what we did in that. We are laying down a rule by which the commission must be governed, and that is, that the question must be justiciable according to the principles of law and equity. This is the language of the Supreme Court in the case of *Buttfield v. Strannahan* (192 U. S., 470), in which it was claimed that the Secretary of the Treasury was vested with legislative power when the duty was imposed upon him to determine upon the grade and quality of certain importations.

The case is within the principle of *Field v. Clark* (143 U. S., 649), where it was decided that the third section of the tariff of October 3, 1890, was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea and hides. We may say of the legislation in this case, as was said of the legislation considered in *Field v. Clark*, that it does not, in any real sense, invest administrative officials with power of legislation. Congress legislated on the subject as far as

was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

Before this decision was rendered the Supreme Court, in the case of *Field v. Clark* (143 U. S., 649), in passing upon an act of Congress which conferred upon the President the power to suspend by proclamation the free introduction of certain imports when he was satisfied that any country producing such articles imposed duties or other exactions upon the products of the United States, uses this language :

That Congress can not delegate legislative power to the President is universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. * * * The true distinction, as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, is between the delegation of power to make a law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made.

This is the most concise statement I have ever read upon the subject.

Mr. President, before concluding I want to ask the Senate this question: If there is any genuine fear here that this commission may exceed the limits of its jurisdiction and involve us in questions that may be dangerous to the interests of the Republic, why not insert in the formal ratifications a clause such as has been suggested by Senator ROOR or by Senator BACON, which, when included in the ratifications, will advise other countries of our interpretation and will practically become a part of the treaty? We can, in general terms, retain the right of the Senate, not to review in every case the judg-

ment of the high commission, but its rights and the right of this Government to reject any judgment of the high commission that would assume to pass upon questions that affect the historic or traditional attitude of the United States, or the provisions of its Constitution, or its political integrity, or any other purely governmental policy. When we do this it becomes a part of the treaty, as the Supreme Court has said in the case of *Doe v. Braden* (16 How., 635), when it uses this language :

Where one of the parties to a treaty at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached, involves a discretion as to what it shall be, and conferring authority or explanation being duly approved by the constitutional authorities of each ratifying power, the declaration thus annexed is a part of the treaty as if it were inserted in the body of the instrument.

Mr. President, I am now concluding, and as the result of my examination of this question, I will take the liberty of giving the Senate the conclusions that I have reached.

In the first place, I believe that the decision of the joint high commission is binding, and so believing, as I have said in my minority views, if the Senate deems it proper to attach to the ratifications an emphatic statement of the propositions that we will exclude from the terms of the treaty, I have no objection to such a supplementary explanation. While I believe it is wholly unnecessary, for the reasons I have given, I would not like any captious objection to a provision of this sort to stand in the way of the accomplishment of this great project that we are engaged in.

Second. As a matter of law, I do not and can not believe that if we adopt these treaties we are in any manner delegating our constitutional treaty-making power, or that we are in any way abdicating any of the rights or privileges of the Senate as defined by the Constitution.

Third. I believe that if an agreement is now made between the President and the Department of State on the one hand and the Senate on the other, by which the Senate shall be given the unlimited right to review and set aside the decision of the joint high commission, and the Senate, in pursuance of that understanding, places a clause of this sort in the formal ratifications, it would be better to rewrite the treaty, eliminating the last clause of Article 3, and take away from the joint high commission the power to decide the proposition whether a controversy is justiciable or not. It seems to me a mockery and a farce to give the joint high commission the powers that we have given it in Article 3 in the treaty, and then outside of the treaty, and contrary to its intent, to practically deprive it of the power that we have reposed in it. If the Senate is to be the final judge and the final interpreter, then there is no necessity of any intermediary process to assist it in the performance of its duty.

This process is exactly equivalent to giving a court jurisdiction of a case, and then, after it has rendered its decision, giving either to the plaintiff or the defendant the right to reverse it. The United States is a party to the case; it is only one party, and to say that after the commission decides it to be justiciable that one of the parties shall have the right arbitrarily, for any reason it may advance, to set the decision aside is an anomaly in law that never, to my knowledge, has appeared upon the pages of any civilized code of jurisprudence. If this comedy is to be enacted, then strike from the treaty the power you have vested in the commission to send the controversy to arbitration.

Senators, I am about to conclude. I am for peace and not for war. I believe in the prerogatives of the Senate, and, so far as its constitutional power is concerned, no one in this assemblage has stood more steadfast and unwavering than I have. In every public utterance that I have ever made I have abided

close to the limitations of the Constitution, and I would not take a step here that I thought invaded in the remotest degree the prerogatives of this body, as announced in our organic charter.

I want to answer another suggestion. If I thought that this treaty meant an alliance with any foreign country, I would rather see it torn into shreds than accept it. I am opposed to any alliance with Great Britain or any other country, or any measure that will lead to an alliance for any purpose whatsoever. My own opinion is that this treaty will become, if adopted in any practical shape, the pioneer of universal peace, and, however reluctant the German Government may now be to enter into the compact, the day will come, I predict, when the situation will be changed and her great people in this country, as great a race as there is among the nations of the earth, will become a party to the proceeding, and when the United States and Great Britain and Germany and France sign and seal the covenant, the era of universal peace will dawn upon the world.

I recall that in the Alabama arbitration, Lord Russell claimed that countries could never arbitrate a question of national honor, but Gladstone arrived at a different conclusion in reference to these claims, and the parties submitted to arbitration, and the award was rendered. The words "national honor" have no meaning in any vocabulary of international law. Each nation is the judge of its own honor, and no such question can be left to arbitration. I care not about its insertion in the present convention with Great Britain of 1908. The convention would answer its purpose just as well without it as with it. It is my duty to state, and I do so frankly, that I am not at all infatuated with the wording of the treaty that is before us. With profound respect and admiration for our great Secretary of State, who occupies a foremost place upon the field of law and of diplomacy, I am not fascinated with the phraseology of this instrument. Here it is, however, before us, and the ques-

tion is: What will we do with it? Seeing no legal or constitutional difficulties that surround it, I shall accept it as it is. Its transcendent purpose is the peace of the world. No technical impediment shall obstruct me in the pathway of its realization. It is bound to come. Nothing can prevent its final consummation. We may delay it, we may retard it, we may obstruct it, but we can not crush or stifle it. When it does come by universal concession it will be the greatest achievement in all the records of civilization. All hail the hour! It has been the dream of my earlier days, and it is the fervent hope and expectation of my maturer years. Then human sacrifice will end. Then man's inhumanity to man will cease. Then the earth will no longer rock beneath the tread of battling legions. Naval armaments will no longer patrol the waters of the world in search for the possessions of unconquered races. Then, under the guidance of the God of the universe, who will direct its flight, the dove of peace will build its nest within the cannon's mouth.

TERMINATION OF THE RUSSIAN TREATY.

Senator Rayner, on December 19, 1911, joined in the general assault upon the treaty of 1832, between the United States and Russia, which barred American Jews from the Russian Empire. This convention was shortly afterward abrogated by a decisive vote of Congress.

I do not propose, at this stage of the controversy, to discuss the various joint resolutions. The discussion upon the pending joint resolution ought to be commenced by the senior Senator from Massachusetts, Mr. LODGE, who has charge of it, and I do not intend now to say anything at all about the resolutions. There is a joint resolution from our committee. There is a House joint resolution. There is a joint resolution either offered or contemplated to be offered by the Senator from Ne-

braska, Mr. HITCHCOCK; and there will be, perhaps, other resolutions, and these various measures, I suppose, will be discussed and voted upon.

I might say in passing that, in my judgment, after a thorough examination of the precedents and authorities, diplomatic and international, I have come to the conclusion that whatever resolution is passed ought to be passed by the Senate and the House of Representatives.

Mr. President, I propose to discuss the treaty, because I am satisfied that the discussion of this treaty is expected in the Senate. It was debated in the House, and the mere form of the joint resolution sinks into utter insignificance with me when placed alongside the object and the purpose that we have in view in abrogating this treaty.

After my presentation takes place perhaps some little light may be thrown upon the subject as to which one of the joint resolutions is the better or the best resolution to pass in this body. What I want to do now is to bring to the attention of this body some of the salient points in this treaty, so that we may know what we are doing, no matter what joint resolution we pass.

For years and years I have tried to study the art of condensation, and I shall put it to use in my remarks now, because they will be as brief as I can make them. If I were to go over all of the ground that is before me, they would be almost interminable, and I must, therefore, select the principle points at issue between the Government of the United States and the Government of Russia and bring them as best I can to the attention and consideration of this body. And when that is done, this body in its wisdom and discretion, will determine what kind of a resolution we shall send to the House of Representatives, because it is my judgment that a joint resolution must be passed by this body and by the House of Representatives before it be-

comes effective. A treaty is the supreme law of the land under the language of the Constitution, and the supreme law of the land ought not to be set aside except by legislative action of both Houses.

Now, Mr. President, to the treaty. Article 1 of the treaty of 1832 with Russia, reads as follows:

There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation. The inhabitants of their respective States shall, mutually, have liberty to enter their ports, places, and rivers of the territories of each party, wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories in order to attend to their affairs, and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing, and particularly to the regulations in force concerning commerce.

Mr. President, the Russian Government, until the year 1865, never placed upon this treaty the interpretation it does now. This treaty was negotiated by Mr. Buchanan in 1832. From 1832 to 1865, 33 years of acquiescence in the terms of this treaty, no such interpretation was placed upon it as the Government of Russia places upon it at this hour.

What is that interpretation? That when a Russian subject who has become a naturalized citizen of the United States returns to the land of his birth, no longer a Russian subject, but as an American citizen, he is subject not to the laws of Russia, but to the laws passed by the Russian Government that appertain only to a segregated proportion of the Russian population, and that if he has left Russia without the consent of the Government he is liable to imprisonment or exile.

I will give you a few lines of one of the provisions of the Russian law. I read from the Russian Penal Code, chapter 7, Article 325. No one would suppose such a penal code was in existence at this hour among the civilized nations of the earth:

Whoever, leaving his country, enters a foreign service without permission of the Government, or takes the oath of allegiance to a foreign power, for this transgression of duty of a loyal subject and of his oath is liable to the loss of all social rights and perpetual banishment from the territory of the Empire, or, in case of his unauthorized return to Russia, to deportation to and settlement in Siberia.

This is the present law of Russia. So if a Russian subject has left the Empire without the consent of the Russian Government and becomes a naturalized citizen of the United States and for any purpose whatever returns to Russia, he immediately becomes subject to the penal code, which strips him of his social rights and banishes him to Siberia.

I want to show you by Article 26 of the Russian code what deportation to Siberia means. We know what it means generally. I read from Article 26:

Deportation to Siberia entails the loss of all family and property rights.

Whatever property or estate he may have is gone and his family rights and ties are severed and dissolved. If you were to read a story like this upon the pages of fiction, you would suppose it was exaggerated, but here it is, an article of the code of Russia. Article 27 reads:

The loss of family rights consists in the termination of paternal authority over the children born prior to the condemnation—

What has the convict done? The convict has been convicted of becoming a naturalized citizen of the United States. That is the crime of which he has been found guilty—

if the children of the convict have not followed him into deportation or if they left him afterwards.

That is the doctrine—once a Russian subject always a Russian subject.

Russia clings to the principle that may possibly have been in vogue in 1832 of indefeasible allegiance, or perpetual alle-

giance, as it is more properly called. It does not recognize the right of any Russian subject to leave the Government of Russia. It does not recognize the right of the Russian subject to become a naturalized citizen of any other country.

I shall not now discuss whether or not this doctrine of indefeasible allegiance, called by the authorities perpetual allegiance, existed in 1832. I have heard what the learned senior Senator from New York, Mr. Root, has said upon this subject, and with great deference to his views, because he has had large experience in this matter, I can not accede to the proposition, though there is a conflict of authorities upon the point, that even in 1832 the United States of America recognized the doctrine of indefeasible allegiance except as to property rights. I should like to read a few lines from what Mr. Bayard has said upon this branch of the discussion:

His Imperial Majesty may "prevent" Russians from coming to the United States, but when they have come, and have acquired American citizenship, they are entitled to the privileges conferred by the article.

The Prussian treaty—

Mr. Bayard continues—

was accepted by Mr. Buchanan and Count Nesserode, the negotiators, as a standard; and the Russian treaty is to be taken with the construction which the Prussian treaty rightfully bears.

It was never contended by Prussia, nor subsequently by Germany, that the validity of the naturalization of a Prussian or German in the United States was, under this article, to be conditioned upon his having emigrated with his sovereign's consent.

I am willing to admit that the preponderance of authority leans the way the Senator from New York has construed this treaty, that in 1832 the doctrine of perpetual allegiance obtained at least with the continental countries of Europe. But what has that to do with this discussion? I want to know how that doctrine stands in 1911, at the hour in which we are discussing it? We have a statute upon this subject. We have

proclaimed to the world the principle of expatriation in no uncertain language and with no ambiguous terms. That statute has been in force ever since 1868, and not one word of protest has gone forth from the Russian Government against that enactment. Let me read it to you. I read from the Revised Statutes of the United States, sections 1999, 2000, and 2001, and I invite the strict attention of this body to this law :

SEC. 1999. Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign States, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disallowed: Therefore, any declaration, instruction, opinion, order or decision of any officer of the United States, which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.

SEC. 2000. All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens.

SEC. 2001. Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government, the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall, as soon as practicable, be communicated by the President to Congress.

The authorities, without quoting them, assert that the local laws of Russia can not override the obligations of a treaty. If this treaty gives the right of entry, if this treaty gives the right of travel and sojourn and residence, no local law of Russia is

paramount to the treaty made between Russia and the Government of the United States. We have that decided in case after case. Let me read just a few lines from Mr. Blaine on this subject when he was Secretary of State, because he asserts it as strongly as it could possibly be put :

It would be, in the judgment of this Government, absolutely inadmissible that a domestic law restraining native Hebrews from residence in certain parts of the Empire might operate to hinder an American citizen, whether alleged or known to profess the Hebrew faith, from disposing of his property or taking possession thereof for himself (subject only to the laws of alien inheritance) or being heard in person by the courts which, under Russian law, may be called upon to decide matters to which he is necessarily a party. The case would clearly be one in which the obligation of a treaty is supreme, and where the local law must yield. These questions of the conflict of local law and international treaty stipulations are among the most common which have engaged the attention of publicists, and it is their confirmed judgment that where a treaty creates a privilege for aliens in expressed terms it can not be limited by the operation of domestic laws without a serious breach of good faith which governs the intercourse of nations. So long as such a conventional engagement in favor of the citizens of another State exists, the law governing natives in like cases is manifestly inapplicable.

But, Mr. President, this law does not affect Russian subjects alone. Let me call the attention of the Senate to this proposition. It affects every American Hebrew, whether he was born in Russia or whether he was born in the United States. There is no distinction here.

If an American Hebrew, now mind you, not a naturalized Hebrew—and what applies to Hebrews applies to Protestant missionaries and Catholic priests and other demoninations—this is no longer a denominational question; it is a question of justice and religious freedom—if an American citizen proposes to go to Russia today, the first thing asked of him is: What is your religion? It is asked of everybody, What is your religion?

I will put it exactly accurate; but before I do that I want to read the circular issued by the Senator from New York

when he was Secretary of State. I hope the Senator will understand that I do it without the slightest criticism, and I do it because I know that he thought he was acting in accordance with the law on the subject. This is the circular :

Under Russian law a Russian subject who becomes a citizen of another country without the consent of the Russian Government is deemed to have committed an offense for which he is liable to arrest and punishment if he returns without previously obtaining the permission of the Russian Government.

This Government dissents from this provision of Russian law, but an American citizen, formerly a subject of Russia, who returns to that country places himself within the jurisdiction of Russian law and can not expect immunity from its operations.

No one is admitted to Russia unless his passport has been viséed or indorsed by a Russian diplomatic or consular representative.

There was a letter addressed to Mr. Root, Secretary of State, by Mr. Louis Marshall and by Mr. Edward Lauterbach, and objections were made in the House by Representatives GOLDFOGLE and HARRISON. I may say in passing that no one knows more about the history of these transactions than Mr. Louis Marshall, one of the most eminent members of the American bar. He says in this letter he addressed to Mr. Root :

To declare that immunity can not be expected by an American citizen formerly a subject of Russia, under these circumstances, is a tacit recognition of the contention of the Russian Government, which is at war with our fundamental principles, and is an implied invitation to that Government, not only to violate the rights of American citizenship, but also to disregard the obligations of the treaty of 1832 solemnized between the United States and Russia.

That circular was withdrawn afterwards and another circular was issued in its place. This was the circular that was issued :

**NOTICE TO AMERICAN CITIZENS FORMERLY SUBJECTS OF RUSSIA WHO CON-
TEMPLATE RETURNING TO THAT COUNTRY.**

Under Russian law a Russian subject who becomes a citizen of another country without the consent of the Russian Government is deemed

to have committed an offense for which he is liable to arrest and punishment if he returns without previously obtaining the permission of the Russian Government.

This Government dissents from this provision of Russian law, but an American citizen formerly a subject of Russia who returns to that country places himself within the jurisdiction of Russian law and can not expect immunity from its operations.

No one is admitted to Russia unless his passport has been viséed, or indorsed, by a Russian diplomatic or consular representative.

ELIHU ROOT.

The objectionable language in this second circular was also afterwards withdrawn.

Now, I have read these circulars, not for the purpose of commenting upon what the Secretary of State did, because I have too high an estimate of his character and ability to imagine for a moment that he would have taken any step in these matters that he did not feel to be right and proper.

No one is admitted to Russia without a passport, which must be viséed or indorsed by a Russian diplomatic or consular representative.

What is the practice? You get your passport. You go before the Russian consulate or Russian ambassador, and one of the questions asked by the consulate or by the ambassador is: "What is your religion?" That is the question, and if the applicant answers that he is a Hebrew, a Jew, they refuse to recognize the passport. It is printed among the questions: "What is your religion?" and whether he has been a subject of Russia or a native-born citizen of the United States makes not a particle of difference. There is not a Hebrew in the United States today, no matter where he was born, who can cross the frontier of Russia for any purpose. There may be exceptions to the rule, but the very exceptions prove the rule.

If he has come over here under age to escape the Russian massacres, as one of the applicants did when his father was massacred in Russia, and applies, as he did, to go back to Rus-

sia to visit the home of his birth and that of his family, he is denied admission; his passport is denied recognition.

That is the state of the law. Still we are asked, in language that is circumspect and guarded, to express our sentiments to Russia as to what religious freedom really means.

Let me give you one or two instances—I can give you many of them—in support of my assertion. I might say here what those of us are after who are speaking here in the cause of religious freedom is not so much the form of the resolution. It is not so much a question whether the President had the right to issue the notice or not, because I am clearly of the opinion that the President has no right to give notice, unless with the consent of the Senate and House of Representatives; but the ultimate proposition is to have this resolution passed so that notice can be given and the treaty may be terminated.

In the case of Kutner, concerning whose religious faith the Russian Government made inquiry, Mr. Blain said:

The representative of the United States is instructed that in conveying the inquiry of the imperial office to Mr. Kutner, the Department of State found itself unable to interrogate him as to the religion professed by him, inasmuch as the Constitution of the United States prohibits the application of any religious tests whatever in respect to our citizens.

That is the way to state it.

In dealing with all this class of cases the department has scrupulously abstained from taking official cognizance of the religious faith of any citizen. It can not inquire into it as a fact, and it can neither affirm or deny that an individual holds a particular creed.

Now let me get to the case of Mr. Cutler. He is a gentleman of Jewish extraction. He is now a manufacturer in the city of Providence; for three terms a member of the General Assembly of the State of Rhode Island. About a year ago the Governor of Rhode Island appointed him as an agent of that State to travel through European countries with the representatives

of the Boston Chamber of Commerce, for the purpose of soliciting business and establishing friendly commercial relations with the traders of the Old World. Mr. Cutler concluded to visit Russia. He applied to the State Department and secured a passport. He went to New York City, because it is a rule of the Russian Government that no passport from any country will be recognized until it is vised by a Russian consul. So Mr. Cutler, armed with his passport, approached the consul at New York City and presented it, and the consul asked him his name, his age, his religion, and upon Mr. Cutler's refusal to disclose the fact that he was a Jew, the consul refused to vise his passport. It developed in the inquiry before the Committee on Foreign Affairs that Mr. Cutler's father had disappeared at the time of the Russian massacres; that he, with his mother, had escaped to this country when he was of the age of 9 years; and that he has grown to manhood in this country. He has become a naturalized American citizen. The consul-general at New York City informed Mr. Cutler that, since he had not obtained permission from the Russian Government to expatriate himself, he was still amenable to the regulations Russia imposes upon her subjects. I have read the history of this case from a statement made in the House of Representatives.

There is so much that can be said upon this subject that it is impossible to cover the field fully, and I merely want to give one more instance. Here is the case of Mr. Horowitz, one of the foremost citizens of his State:

On March 30, 1908, being about to go to England on business, he determined to visit his birthplace in Russia, and at the same time to go to St. Petersburg for the purpose of investigating various matters connected with the proposed contract between the Russian Government and his company regarding the construction of a passenger depot. Having sailed for England on March 31, 1908, in a hurry, he requested the company's local manager at Washington to secure his passport and mail it to him. His representative learned that there were difficulties, and therefore retained Messrs. Penfield & Penfield to attend to the securing and validating of the passport.

On April 1, 1908, Judge Penfield presented the passport at the Russian Embassy at Washington, was asked whether Mr. Horowitz was a Jew, replied in the affirmative, and the visé was refused.

In consequence of this refusal Mr. Horowitz returned home without visiting Russia.

A prominent and distinguished Member of the House of Representatives, Mr. LONGWORTH, informed me the other day that when he sought a passport for a well-known citizen, I think of Cincinnati, the Russian consul or the Russian ambassador—I do not recollect which—observed that the name of the gentleman's wife was Rebecca, and, knowing that Rebecca was a scriptural name, he came to the conclusion that she was a Jewess, and he declined to vise the passport until Mr. LONGWORTH satisfied him that, although her name was Rebecca, she was a member of the Christian faith.

I suppose if there was some very prominent man who wanted to visit Russia and the Senate of the United States would pass, and the President of the United States would sign a resolution asking that he be allowed to go to Russia, perhaps the Russian Government would grant the request. I am not asserting that there may not be some exceptional cases, made so because of political or diplomatic influence, but I know of no such case. I know some years ago one of the most celebrated divines in this country, a Hebrew, a man of great intelligence and learning, exerted all the influence he could to have his passport viséed. He was not, I believe, a Russian subject. He wanted to go to Russia for the very purpose of laying this matter before some of the authorities there. His errand was an errand of peace, but he was refused a passport and could not go there. No man is going to answer a Russian consul what his religion is. What business is it of a Russian consul or of a Russian minister or the Russian Government what my religion is in the United States of America?

The Russian Government construes this treaty as meaning

that an American Hebrew who goes to Russia is subject, not to the laws of Russia, but is subject to the laws that apply to the Hebrew population of Russia. In the Russian code there is provision after provision that debar the Hebrews of Russia from exercising the same rights and privileges that the remainder of the population of Russia enjoy.

I want to give one more case, and then I will finish that branch of the discussion. As long ago as 1893, upon the refusal of a Russian consul-general to indorse the passport of Mrs. Minnie Lerin on the ground that she was of the Jewish faith, our Secretary of State—that was Secretary Gresham—communicated with the Russian Minister of Foreign Affairs as follows :

His Majesty's Government surely can not expect the United States to acquiesce in the assumption of a religious inquisitorial function within our borders, by a foreign agency, in a manner so repugnant to the national sense. I can not but surmise that some strange misapprehension exists in that regard in the mind of His Majesty's Government.

But Russia replied :

The consul general acted in accordance with instructions from his Government.

Now, Mr. President, let me give the Senate an instance of what was done by one of our diplomatic officers not accredited to Russia, but to Turkey, himself an American Hebrew, a man of high distinction in this country, and who today could not have his passport vised, I suppose, if he intended to enter Russian territory. I refer to Mr. Oscar Straus, who was in Turkey at the time the Sultan declined to permit American teachers, educators, and missionaries to travel through the country. There, besides a passport from your own country, you must have an internal passport. The Sublime Porte announced that the Turkish Government would not permit missionaries to travel through Turkey, and would not give them a passport. The reply of our minister ought to ring through the

land, and ought to be emblazoned upon the walls of every diplomatic embassy in the world. He had the courage to do what no minister to Russia up to date has had the courage to do. He was not the slave and serf of the Turkish court. He represented American principles. Listen to his declaration :

If the Turkish Government will not consent to their safety here, I will, and I will give them an order of safe passport to any part of the Empire that they may wish to enter, and they may return to their former dwelling places in peace and out of danger. If any harm comes to them you will have to answer to my Government for the consequences.

If a proclamation of this character had long ago been issued by our ambassadors to Russia, this question would long ago have been settled. What was the result of it? They cited the Russian precedent, but the next morning, at half past 1 o'clock, Mr. Straus was awakened from his slumbers and was told that there had been a hurried meeting of the Turkish Council, and they had consented to agree to the proposition. And these missionaries and teachers went to their respective places of destination.

Let me give you another incident. No country would stand what this country has stood for years. It is only a few lines, but let me give you one which took place in the French Chamber of Deputies, and then I will have practically finished :

M. HIPPOLYTE LABOCHÉ. Gentlemen, on two occasions the Russian Government has made treaties of commerce with France, the fundamental intent of which it has later totally declined to regard.

In the presence of the Minister of Foreign Affairs I shall call the attention of the Chamber to the disregard of obligations involving acts which this chamber has approved—a disregard in consequence of which the interests and rights of numerous French travelers are sacrificed by an interpretation unacceptable to us.

* * * * *

Nevertheless, the treaty once concluded, the Russian Government draws a distinction between different classes of the French people to whom it undertakes to close its frontiers, namely, members of the clergy, freethinkers, and Jews.

Then he says :

We have gained the point that no account will be taken of religion ; and we have declared that France will never put her signature at the bottom of a treaty which makes any difference of treatment among her travelers.

Mr. President, I shall now conclude. I could say a great deal more, but I have covered the main points of this controversy. You ask me: Is there any other remedy except abrogation? No; there is no other remedy.

There is no other remedy except abrogation of this treaty. The ingenuity of man can not suggest another remedy. We have been negotiating now for 40 years with Russia, and no remedy has been proposed. We must surrender or give notice to terminate. It would be cowardly to surrender. The night of barbarism must close, so far as we are concerned. This is the land of religious liberty, so ordained by the wisdom of God, and so created by the genius of man. We can not permit any autocratic government to visit this iniquity upon our citizens. The day of religious inquisition is over. It is useless to talk of negotiation. The Russian Government can not be negotiated with. Without criticizing the State Department or anyone else, I can not understand why this Government has not long ago demanded of those in authority in this despotic land, that if they do not amend their code of religious persecution and become proselytes at the altars of reason and humanity, they will no longer be tolerated to retain friendly contact and intercourse with our free institutions.

What is the cause of this intolerance? Have these people committed any crime against the laws or institutions of Russia? Yes; they have. They have committed the same crime which their forefathers committed and which their posterity will continue to commit to the remotest generation. They have worshiped God according to the traditions of their faith and the dictates of their conscience. Just think of it. Here is a people

who for centuries have been persecuted, but who have torn asunder their chains and have arisen purified from the fires of persecution, until now, as the result of their restless and untiring energy of purpose, they not only occupy a commanding position in all the marts of trade and commerce, but without attempting to make a convert, they are in silence exercising a most tremendous influence upon the destinies of the spiritual world, in every place and quarter of the globe, except in this benighted land, where a code of laws has been promulgated against them that has despoiled their homes, driven them from their temples, and sent them forth as outlaws from shore to shore until, weary and exhausted, they come to us and ask us that, as a free people, we protest in unmeasured terms against this wrong.

In order to become more fully acquainted with the system that prevails in Russia, I have read its Draconian code. It has now been translated into every language of the living for the edification of mankind. It has been circulated in every library of Europe, and what wounds me to the heart is that this Iliad of a people's woes, echoing from place to place, has never yet struck a responsive chord upon any of the highways and centers of civilization. Read these enactments, directed not against the subjects of Russia, but against the faith and worship of this race, who, by no fault of their own, have been planted upon its soil, and you will agree with me that since the night of Egyptian bondage no ban has ever been pronounced by priest or king that ever carried with it such a train of disaster.

It has been said in extenuation of the policy that the Emperor of Russia is pursuing against them that he is influenced by the very best intentions, and that his acts are not inspired by any malevolent purpose. This I believe. Religious persecutors, as a rule, are always influenced by the best intentions, and their motives are generally of the highest and purest character.

A celebrated historian has said it is the very ardor of their sincerity that warms them into persecution. It is the holy zeal by which they are fired that quickens their fanaticism into a deadly activity. I humbly pray Heaven, in its mercy, may mitigate his zeal and weaken his sincerity, for whenever that takes place, then, perhaps, Hebrew villages will no longer be consigned to the torch of the marauder, and the home of the heretic and the honor of his fireside will no longer be considered the lawful prey of the Russian soldiery.

It is also said that there is an easy escape from all these hardships if the victim of this persecution will only embrace the established religion of the Empire, as provided for by law. This proposition is absolutely true. In reference to the suggestion, I desire to say that if the Emperor of Russia, who is at the head of the ecclesiastical church of the realm, by some supreme act of inhumanity directed against these prostrate victims of his intolerance will offer them the alternative of either accepting the faith of their persecutors or the imposition of an additional servitude, I think I know what the result will be—they will never abandon the altars of their fathers. For centuries their ancestors spurned the fagot and the flame, and these people, emulating their heroic fortitude, will bear up under affliction, will submit to the sundering of domestic ties and to the agonies of separation. They will defy imprisonment, and they will proceed to the inhospitable shores of exile rather than compromise with their tormentors or abandon one article of that immortal creed which during all the generations "in pastoral tents of the shepherd, in the sumptuous palaces of the kings, and among the broken pillars and arches of the temple has always maintained its inviolable simplicity."

Senators, take this as you will, it is nothing but religious persecution directed against citizens of the United States. You ask for other methods of relief. There is no other method of

relief. Tell me what other methods there are. Do we propose to keep treaties and allow other governments with whom we have made them to break them at their will? No other civilized nation on this earth would assume such a humiliating position. This treaty has been broken in its organic and most vital part. The heart of this compact has been pierced, and raising as it does with us the question of religious freedom, its most sensitive feature has been mutilated and trampled upon. We deserve the contempt of mankind if we reel at the blow and submit to this degrading indignity. There is no way out of it except the termination, the rescission, or the abrogation of this treaty. Call it what you will. I care not what a man's religious belief may be, if he is an American citizen he is entitled, under an American passport, to the privileges of the world. These helpless victims of religious intolerance are American citizens. For 40 years their pleading voice has gone across the water asking for their rights. It has all been in vain. Now this Government is behind them, the land of their adoption and their choice. To us they look, as their ancestors in 40 years in the wilderness looked to the cloud by day and the pillar of fire by night—to lead them to their deliverance.

Senators, in the name of justice, in the name of humanity, and, above all, in the name of religious freedom, I ask, whatever form it may assume, for the speedy passage of this joint resolution.

GENERAL-WELFARE CLAUSE OF THE CONSTITUTION.

During the debate in the Senate on January 30, 1912, upon a bill creating a Children's Bureau, Senator Rayner rejected the idea that the constitutionality of any beneficent measure may be established under the general-welfare clause.

I am in favor of the bill, but I did not intend until this morning to make any remarks upon it at all. I would not submit

my views if it were not for a little dialogue that was carried on during a debate upon the measure between the Senator from Texas, Mr. BAILEY, and the senior Senator from Montana, Mr. DIXON. I will read a few words of that colloquy, which, I hope, will justify my observations.

MR. BAILEY—But under what provision of the Constitution is this measure proposed?

MR. DIXON—The general-welfare clause.

MR. BAILEY—I knew it would come to this. This bill really undertakes to excuse itself on that ground because it is entitled "A bill to collect statistics for the 'welfare' of the children."

* * * * *

MR. DIXON—I had not intended to raise any constitutional question in what I had to say, but as long as the Senator from Texas has raised the constitutional feature of the matter, I will say that we certainly have the power under the general-welfare clause of the Constitution, which has accommodated itself to thousands of enactments by Congress. The opening clause of the Constitution certainly covers the bill under consideration.

Mr. President, I can not stand that. I propose to vote for the bill, but if I could not put it under any other clause of the Constitution except the general-welfare clause and the preamble of the Constitution itself, I would not vote for it, no matter how beneficent and excellent a measure it may turn out to be.

I thought, Mr. President, that we had settled this question long ago in the Senate by agreeing that there is no general-welfare clause in the Constitution of the United States. I challenge contradiction upon that point.

All the authorities and all the text-writers agree, without one discordant voice, that there is no substantive general-welfare clause in the Constitution of the United States, and the Senator from Texas is perfectly right upon that proposition. We have taken an oath here to support the Constitution of the United States. How can we support the Constitution of the United States if we vote for a bill that comes under an alleged general-

welfare provision if there is not any general-welfare clause at all?

The text writers, with unanimity, admit that there is no such substantive provision as the general-welfare clause. Here is what Hamilton says in his celebrated report upon manufactures in 1791, which was the first interpretation of this clause:

Common defense and general welfare are not to be construed as a distinct grant of power, but are qualifications of the objects of the taxing power.

Judge Story, upon page 661 of his first volume upon the Constitution, uses this strong language with reference to this clause:

* * * Do the words "to lay and collect taxes, duties, imposts, and excises," constitute a distinctly substantial power; and the words "to pay the debts and provide for the common defense and general welfare of the United States," constitute another distinct and substantial power? Or are the latter words connected with the former so as to constitute a qualification upon them? This has been a topic of political controversy, and has furnished abundant material for popular declamation and alarm. If the former be the true interpretation, then it is obvious that under color of the generality of the words to "provide for the common defense and general welfare," the Government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumerations of specific powers; if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, "to pay the debts and provide for the common defense and the general welfare."

* * * The reading, therefore, which will be maintained in these commentaries is that which makes the latter words a qualification of the former; and this will be best illustrated by supplying the words which are necessarily to be understood in this interpretation. It will then stand thus: "The Congress shall have power to lay and collect taxes, duties, imposts and excises in order to pay the debts and to provide for the common defense and general welfare of the United States;" that is, for the purpose of paying the public debts and providing for the common defense and general welfare of the United States.

A school of commentators arose after the adoption of the Constitution, who had taken a recess for a hundred years until the Senator from Montana rang the bell and assembled them

again in convention, who claimed that this was a distinct clause; that we could not only lay and collect taxes, duties, imposts, and excises to pay the debts, but that we could provide for the common defense and general welfare as a separate proposition. When Story comments upon that provision, he says that it means that we can lay and collect taxes, duties, imposts, and excises in order to pay the debts and to provide for the common defense and general welfare.

I want to quote a few lines now from Pomeroy. These are all gentlemen who belong to a different school of constitutional construction from the one I do, but I am willing to take their interpretation. I will read what Pomeroy says upon the subject. It is a very plain and explicit statement. Pomeroy states:

Congress has power "to lay and collect taxes, etc., to pay the debts and provide for the common defense and general welfare of the United States." Do these two clauses contain two separate and distinct powers, or is the latter a limitation upon the other? In other words, does the Constitution, by this language, confer upon the Legislature a general faculty of taxation, and also another general capacity to pay public debts and provide for the common defense and general welfare; or does it confer a limited power of taxation by restricting the purposes for which taxes may be laid and confining them to the payments of debts and provisions for the common defense and general welfare? * * * If the construction should be adopted which regards the second clause as an independent grant of power, it would in effect be making our General Government unlimited. Providing for the common defense and general welfare includes everything which any government could possibly do; and a grant of power in these broad terms would be the same as making Congress omnipotent, equal in the extent of its functions to the British Parliament.

Now, I will read one decision and I will ask leave of the Senate to print a few other decisions upon the matter. This is a decision in the western district of Missouri, by Judge Rogers, whom I knew to be a very able man:

The "general-welfare" clause "contains no grant of power whatsoever, but it is a mere expression of the ends and purposes to be effected by the preceding power of taxation." I content myself with the fact that

the former construction has never been sustained by any court, and the reverse has been held so often as not to require citations to support it; while the latter construction rests upon the theory that the "general-welfare" clause contains no power of itself to enact any legislation, but, on the contrary, the words "and provide for the common defense and general welfare of the United States," according to the most liberal constructionist, is a limitation on the taxing power of the United States, and that only.

No case has been cited tracing the power to enact any statute to the general-welfare clause above quoted, and I do not believe any can be. The learned counsel, in this connection, has cited various acts of Congress of a nature quite similar to the one in question, but no number of statutes or infractions of the Constitution, however numerous, can be permitted to import a power into the Constitution which does not exist, or to furnish a construction not warranted. * * *

Mr. President, what is the use of talking about the general-welfare clause of the Constitution? The Senator from Montana, with great respect and deference to him, has gone so far as to say that we are authorized to pass this law under the preamble of the Constitution; that Congress can pass laws under the preamble of the Constitution.

I quote in this connection what Story says in reference to the preamble of the Constitution. The preamble reads as follows:

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Here is what Story says upon that:

And here we must guard ourselves against an error which is too often allowed to creep into the discussions upon this subject. The preamble never can be resorted to to enlarge the powers confided to the General Government or any of its departments. It can not confer any power *per se*; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the Constitution. Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the preamble declares one object to be, "to provide for the common defense." No one can doubt that this does not enlarge the powers of Congress to pass any measures which they may deem useful for the common defense.

I read from Madison in The Federalist :

Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution on the language in which it is defined. It has been urged and echoed that the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections than their stooping to such a misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general-welfare expressions just cited, the authors of the objection might have had some color for it. * * *

But what color can the objection have when a specification of the objects alluded to by these general terms immediately follows? * * * For what purpose could the enumeration of particular powers be inserted if these and all others were meant to be included in the preceding general power? Nothing is more natural and common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing had not its origin with the latter.

Now, let us see what Jefferson said upon the subject :

To lay taxes to provide for the general welfare of the United States, is to lay taxes for the purpose of providing for the general welfare. For the laying of taxes is the power, and the general welfare the purpose, for which the power is to be exercised. The Congress are not to lay taxes *ad libitum* for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased. * * *

There is another school of constructionists, liberal constructionists, who claim, as Hamilton did, that the power to lay taxes must be coupled with the power to tax for the general welfare. In other words, that when we come to lay taxes, or when we come to appropriate for the purposes of this bill, while we have not any power to pass the bill, we have the power to tax and appropriate money for the purposes indicated in the bill. It might seem very strange, but a school of interpreters, who stand very high upon constitutional construction, have contended for this point. Story discusses it for 50 pages in his volume on the Constitution, admitting that we have not the power under the general-welfare clause to do anything. Nevertheless, under the taxing clause we have the right to tax and appropriate for the purposes that we have not any power or jurisdiction to accomplish. The ground will be taken in this debate before it closes, I think, from what I have heard when gentlemen arise to place this bill where it must be placed, under some clause of the Constitution, contrary to the contention of the Senator from Montana, that there is no general-welfare clause of the Constitution. They will contend for the proposition that Story contended for, vainly, I think, that while you can not pass a bill in the interest of the general welfare, you can tax for the general welfare.

In other words, the Committee on Finance and the Committee on Appropriations can levy a tax and appropriate money for the purposes of this bill, but we have not any right to pass the bill. Story says it is a dilemma, and that he will extricate himself from the dilemma. With great deference to his profound learning, I do not think he has extricated himself from the dilemma. I read a few lines from what I think the greatest work on constitutional law, written by as great a lawyer as there ever was in the country, to show what he calls the absurdity of that position. I will submit to the Senate what Mr. Tucker says.

Before reading from Tucker I want to say that Hamilton and Madison agree that there is no general-welfare clause, but when they come to the taxing power Hamilton contended you could tax for the general welfare, and Madison contended you could only tax for the general welfare as far as it was governed, and circumscribed by the enumerated and delegated powers of the Constitution. Now, Mr. Tucker says:

It would really seem absurd to impute to the framers of the Constitution a purpose to comprehend objects far beyond the powers it conferred upon the Government.

In other words, Congress can not make and control a railroad; but it may raise and appropriate money for the benefit of a corporation that is to regulate and control it. Such a construction of the Constitution is anomalous. It gives an unlimited power of raising money, to be expended at the discretion of Congress, upon any and all schemes which Congress might deem for the "common defense and general welfare," although such schemes Congress is not empowered to project or to carry into execution by any power delegated to it.

Mr. President, I made up my mind long ago, that when contemplated enactments were under consideration, the first thing I would do, would be to ask myself the question: Does this come under the Constitution of the United States? I care not what the measure may be. I care not what benefit it may confer upon the country. If I am not satisfied in my own mind, giving the Constitution not a narrow, but a fair construction, if I can not find some clause of the Constitution under which the measure comes, then I am bound to vote against it, or I violate my oath as a Senator of the United States.

I place this provision under the only clause of the Constitution that it ought to be placed under. Perhaps other Senators may find other clauses and other provisions, but I have placed it under the only provision that I think it can arrange itself under, and that is under the census, or, rather, the enumeration, Article I, Section 2, subsection 3. If we can not place it under that clause, then I should like some Senator to rise and tell me under what clause it does belong.

I have the same idea about this in my head that I think the Senator from Texas, Mr. BAILEY, has, because I can always tell what he is thinking about from the way he looks. If we were now to pass a census act, the very first census act, I think he and I would agree that enumeration means enumeration, and it does not mean anything else. But I am met with the proposition that it has for a hundred years received an entirely different and more enlarged construction.

I agree with the Senator from Texas that the fact that law after law has been passed that is unconstitutional, affords no justification for passing another law that is unconstitutional. In other words, it is contended, when you want to support an unconstitutional law, all that is necessary to do is to cite some other laws that are unconstitutional in support of the proposition you are contending for.

But, Mr. President, this census act has stood for a hundred years and over. It has been referred to in statute after statute, providing not only for the taking of the census, but referring to facts and statistics that have been gathered by the census. It has been referred to without being interpreted, by the Supreme Court of the United States, over and over again.

Here is the Census Committee, of which my distinguished friend, the Senator from Texas, is the ranking member, that has never brought in a single protest against the work the census is doing. In all these hundred years not one objection has been made to the work the Census Bureau is engaged in, and it is engaged in exactly the same sort of work that this bill contemplates.

I therefore take it, when a statute has stood for a hundred years without objection, when committee after committee of both Houses of Congress have approved of it, when the work has gone on from year to year without protest, when statute after statute has referred to the work that is being done under it, when the Supreme Court in any number of decisions has re-

ferred to the provisions of the census and the acts that are being done under it, we might presume that when the question goes before the Supreme Court, the Supreme Court will hold it is too late to open the question.

I have a decision on the subject for whatever it may be worth—it took me about three days to find it, and I will give it to the Senate. I want to say that this decision was rendered by a very able judge, who is now one of the justices of the Supreme Court of the State of New York. He was then district judge—Judge Thomas, the district judge for the southern district of New York. The point was made: What right had the Census Bureau to do the work that it is doing; that the Census Bureau, under the Constitution, had only a right to enumerate, to make an actual enumeration of inhabitants; that is all, the Constitution says. Here is what Judge Thomas says, too:

Respecting the suggestion that the power of Congress is limited to a census of the population, it should be noticed that at stated periods Congress is directed to make an apportionment, and to take a census to furnish the necessary information therefor, and that certain representation and taxation shall be related to that census. This does not prohibit the gathering of other statistics, if "necessary and proper" for the intelligent exercise of other powers enumerated in the Constitution, and in such case there should be no objection to acquiring this information through the same machinery by which the population is enumerated, especially as such course would favor economy as well as the convenience of the Government and the citizens. * * *

* * * * *

For the National Government to know something, if not everything, beyond the fact that the population of each State reaches a certain limit, is apparent, when it is considered what is the dependence of this population upon the intelligent action of the General Government. Sanitation, immigration, naturalization—

And then, quoting one power after another, he ends up in this way:

for these and similar purposes the Government needs each item of information demanded by the census act, and such information, when obtained, requires the most careful study, to the end that the fulfillment of the governmental function may be wise and useful.

This is the case in one hundred and sixth Federal Reporter. Mr. President, if it does not come under that provision, then it does not come under any provision. I, therefore, think this is census work. The language of this bill is:

The said bureau shall investigate and report upon all matters pertaining to the welfare of children and child life, and shall especially investigate the questions of infant mortality.

I think the Census Bureau could constitutionally do this work. In other words, if the Census Bureau were to undertake to do this work, then I think it would be in the exercise of a constitutional function. I understand—I was not present, but I think the report so shows—that the Director of the Census came before the committee, and he was asked why the Census Bureau could not do this work. The answer of the Director was that he did not have the facilities for doing it.

I am not arguing, however, upon the policy of this bill at all. There is much to be said upon both sides of it. I am arguing simply the proposition of law, that if it does not come under this clause, it does not come under anything, and that if the work that is contemplated by this bill were to be done by the Census Bureau—that is to say, if we should order the Census Bureau to do this work—it would be constitutional. If the Census Bureau can do this work, and if the work that the Census Bureau does under a bill of this sort is constitutional, then, by an independent measure, we can institute a separate bureau to do it. I think that one proposition follows from the other with irresistible logic. If the Census Bureau were to undertake to investigate and report upon all matters pertaining to the welfare of children, and so on, it would come under this decision. It would come under it and be a constitutional performance of the duties of the Census Office. Then we have a perfect right to accomplish the same purpose as a matter of law by this bill.

"THE CHARTER OF DEMOCRACY."

In this address Senator Rayner on February 27, 1912, combatted in the Senate the radicalism advocated by Former President Theodore Roosevelt before the Ohio Constitutional Convention.

I hope in what I am about to say today upon the subject that I have announced, that the Senate will understand that I am not influenced by any political considerations whatever, because I believe that our party will succeed in the next Presidential contest, no matter who may be nominated by the Republican convention. I have another purpose to subserve entirely, and that is to present to this body my views upon a proposition that was advanced by ex-President Roosevelt before the Constitutional Convention of the State of Ohio a few days ago in an address entitled "The Charter of Democracy," and which I regard as the most dangerous doctrine ever brought forward by anyone who has the slightest regard for the stability of our institutions, and whose opinion is entitled to any weight or respect.

In this address of the ex-President there are a number of suggestions, such as the election of Senators by the people and primary elections for the nomination of political candidates, with which I entirely agree. What I desire to call attention to today is a unique and original conception which he advanced upon this occasion and which I quote literally, as follows:

The decision of a State Court on a constitutional question should be subject to revision by the people of the State.

If any considerable number of the people feel that the decision is in defiance of justice, they should be given the right by petition to bring before the voters at some subsequent election, special or otherwise, as might be decided, and after the fullest opportunity for deliberation and debate, the question whether or not the judge's interpretation of the Constitution is to be sustained. If it is sustained, well and good. If not, then the popular verdict is to be accepted as final, the decision is to be treated as reversed, and the construction of the Constitution

definitely decided—subject only to action by the Supreme Court of the United States.

Mr. President, if a proposition of this sort had been advanced by an ordinary agitator or by an anarchist, no attention would be paid to it. The people would understand that it was utterly meaningless, and it would involve no actual danger to the Republic. We must realize, however, that this is the utterance of a political leader, who occupies today as prominent a place before the public as anyone in the country, who is gifted with tremendous power, who commands great popularity, and who for seven years occupied the position of President of the United States, and who is now a candidate again for office.

I would like to accept the apology that has been offered for him by one of the leading papers of the country, when it says:

We shall pay Mr. Roosevelt the compliment of stating that we do not think that he believes a word of the nonsense he uttered in this speech.

But I can not do so. I would rather accept the criticism of another great paper, which observes in its editorial columns as follows, in commending to the attention of every body this salient feature of his address:

We beg leave to remark that it is the most astonishing and, in the view of healthy intelligence, the craziest proposal that ever emanated either from himself or from any other statesman since the organization of our Government by law.

I am inclined to think that the last criticism goes perhaps a little too far when it says that it is the craziest proposal that ever emanated from himself, because I have from time to time taken the liberty to submit to the Senate a number of other proposals of the ex-President which are equal to it in this regard. I want it to be known that I am very fond of the ex-President, and whenever I have an occasion to comment upon any of his constitutional views I have always done so with the greatest deference and respect.

What I would really like to know now is, not as a matter of curiosity, but for my own information, whether any **man** of intelligence, in his sober moments of thought and reflection, agrees with him in this contemplated change that he proposes to make in the nature of our institutions. I would like some member of the Senate to arise here now, or at any time hereafter, and announce to the country and to his constituents that he believes in the doctrine that popular verdicts should supersede judicial construction upon constitutional questions.

I would like to arise, for instance, before the people of my State—and I represent as intelligent and patriotic a constituency as there is in the Union—and address them as follows: "Fellow citizens, whenever the Court of Appeals of Maryland decides that an act of the General Assembly of Maryland is unconstitutional, then the decision shall be submitted to the people, and if the people at a popular election, by a majority of their suffrages, decide otherwise, then the court shall be reversed and the decision set aside." What do you suppose, Mr. President, they would do with me? What disposition would they make of me, and where would they send me?

Just let us grasp this appalling announcement for a moment, and, if we can, let us realize that it was deliberately made after the most thorough preparation and with an actual purpose in the mind of its author that if again invested with the reins of power he would, with all the influence that he can command, advocate to the people of the States that they should, by constitutional amendment or otherwise, put it into practical execution. I am not speaking as a partisan now, and I assure you upon my honor, that I do not want to do anything that may weaken the chances of Mr. Roosevelt for a renomination at the hands of his party, because I do not believe that our party could have an easier opponent to defeat than a candidate who, by an inflammatory proposal of this character, has arrayed against himself the united intelligence of the country.

I am speaking of this declaration from an entirely non-partisan view so as to present, if I can, to my countrymen, the overwhelming peril that confronts them, if any man, to whatever party he may belong, who entertains such an idea of our institutions should again at any time or under any circumstances be invested with the administration of our affairs. I would like to go a step further than this and ask if, in any civilized country where anarchy does not prevail, such a scheme of outlawry has ever been suggested upon all the pages of history.

People who regard this merely as a flippant and impulsive utterance of a candidate for public office who is trying to attract public favor are making a great mistake. In my judgment, the ex-President has been reflecting over this proposition for years, and, contrary to his usual custom, it is the result of profound study and investigation upon his part of the judicial history of the country. He has always been hostile to the decisions of the courts whenever they conflicted with his own views, and he has over and over again, in private and in public, given expression to his opposition to them. I can recall statement after statement that he has made upon this identical subject, and his reappearance now for public favor indicates to me that he is willing in this particular to identify himself before the people as the apostle of destruction and to aim with all his energies and with unerring precision at the judiciary of the country for the purpose of leveling the distinctions of the Constitution and destroying as far as possible the most sacred department of American institutions.

It is folly to tell me that he will exercise no influence with the people of the States if he succeeds in accomplishing his present ambition. No living man wields the power today that he does with a certain class of their citizenship. If it were not for this, and if I thought that this utterance was merely an impetuous outburst, I would pass it by and let it die at its birth. This I know is not the case, and I speak of my own personal knowl-

edge, when I say that the idea is firmly implanted in his mind that if he ever again has the power, he will do all that lies within his reach to effect the identical purpose that he has thus indicated, and I, therefore, take him at his word. You will observe that he is very careful in what he says, and that his proposition is not to take away from the courts either by constitutional amendment or otherwise their power to construe an act of the legislature. His idea is to leave that power where it is, in the courts, and though their decisions may be in perfect accord with the law and with the Constitution and with the authorities, nevertheless, to give to the people the right to reverse their judgments and decrees, and from day to day, by popular verdicts, to make constitutions of their own. Of course it follows as a necessary corollary that if they can do this with the decisions of the courts, they can do it with enactments of the legislature, and, therefore, at one fell swoop, not only the judicial, but the law-making power would lie prostrate at our feet.

If a legislature in any State should pass a law confiscating private property and deprive men of their earnings and possessions honestly and legitimately acquired without any compensation or by any process of law, and appellate tribunals should determine that such an act was in violation of the organic law of the land, then the people would have the right to meet upon a town lot or in a convention hall or at a popular ballot and set aside the solemn decrees of their judicial tribunals. In other words, public clamor, public agitation, and the appeals of demagogues are to deprive the courts of their highest functions and enable the people to take the law into their own hands whenever the rights of property or the liberty of individuals may be involved, with this pacifying modification of the scheme that this attack upon our institutions must stop at the doors of the Supreme Court of the United States. Why, I ask, at the Supreme Court? The Supreme Court is the very tribunal that

Mr. Roosevelt has mercilessly attacked whenever it has dared to disagree with him in his interpretation of the law. Why not have complete anarchy? Why have only partial anarchy? Why not carry this beautiful system to the utmost limit of its complete perfection? I insist upon it that you have no right to stop at the threshold of the Supreme Court, and I submit to the ex-President that in order to perfect the symmetry of his plan and to have perfect harmony in its arrangements, whenever the Supreme Court renders a decision that is not in absolute accord with his own views, if he should happen to be President, that he summon to the ballot box the people of the United States to set aside the judgment of the court, and, if his motion is seconded and it meets with popular approval, let him issue a proclamation that the motion is carried and the decision is reversed.

A justice of the peace followed this plan in our earlier days in one of our States. A prisoner was before him for murder upon a preliminary hearing. The office of the justice was thronged with friends of the prisoner. After the testimony was concluded the counsel for the prisoner said, "Your honor, I make a motion that the prisoner be discharged." In all of his practice the justice had never heard of a motion, and he did not know what to do with it. Deliberating upon it for a few moments, he said, "Gentlemen, is there a second to the motion?" The motion was seconded. "Now, gentlemen, you have heard the motion. All in favor of it say 'aye'" The motion was unanimously carried, and the prisoner was acquitted.

Mr. President, what is the use of having any courts at all? What is the use of having any constitution? Why did the framers of the Constitution say that—

The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain or establish.

Why did they not say that the judicial power shall be vested in the people? Mr. Roosevelt says the people made the Constitution; now let them interpret it. This is the substance of his argument, if it can be dignified by the name of argument. This is the hallucination that he is trying to inculcate in the minds of the rising generation. This is the new revelation of which he is the prophet and the messiah. Mr. President, where did the people ever make a constitution? Give me an instance of it. I challenge him. They have ordained, they have established, and they have ratified, but where have they ever made a constitution.

He forgets that in every constitution that has ever been adopted in these United States, the people, through their representatives, in convention or otherwise, have established the forum that is to interpret the constitution that they have ordained. The people change from day to day, but the tribunal that they have constituted to interpret the law, lives forever.

Now, there is a motive for all this, and there is a cause for this attack upon the institutions of the land. I think I can tell you what it is. It arises from the fact that when Mr. Roosevelt was President, he was not allowed to influence and control the decisions of the courts, and they declined to pass under the domination of his arbitrary and imperious will. Of course, judges are only human; they have made mistakes and their adjudications are not divine; but one thing they have done to their eternal credit, and that is, that they have stood as a barrier between him and dictatorial usurpation.

During the whole of his administration he had an idea lingering in his mind that it was the duty of the courts to carry out the policy of the executive branch of the Government, and this belief was connected with another idea, and that was, that so far as executive functions were concerned, he was absolutely supreme, unlimited by the specifications of the instrument that created them. I recall an incident that occurred during

his administration that illustrates the point that I am now making.

Some few years ago, during his reign, a prominent member of the New York bar delivered an address before the New York Bar Association, contending against Webster, and the most profound and illustrious statesman that this country has ever produced, that when the Constitution invests executive power in the President it gives him unlimited executive power, and that he was in no manner bound by the delegated powers assigned to him in the instrument, and that he had the same prerogative as the Czar of Russia or any potentate of the most absolute monarchy. When the President heard of this address, he sent for the author of this frantic proposition, embraced him, extended to him the hospitalities of the Executive Mansion, showered upon him his presidential benedictions, and informed him that he was the only lawyer whom he had ever met who had the proper conception of the Constitution of the United States.

Now, what is the present situation? Mr. Roosevelt is a candidate for President of the United States. There was no need of any persuasion whatever to induce him to enter the field. There was no dragging of Cincinnatus from the plow, and there was no necessity that any Mark Antony should thrice upon the Lupercal, offer him the crown. He is willing to come with his own crown and frame a constitution of his own in accordance with the charming and alluring platform that he has promulgated. I do not know what sort of a new party we will have if he is nominated and elected. We have quite a number of parties on hand now. There are Republicans and Democrats, and insurgents and progressives, and radicals and reactionaries, and neurotics and paranoiacs, and another party will only add to the gayety and festivities of the entertainment.

I have written some brief amendments to the Constitution for Mr. Roosevelt, which I believe that he will accept if he will

examine them carefully, and I would like to tender them to him so that if he is again called to the throne he can incorporate them in his message to Congress; and as I am satisfied Congress will pass them, they can then be submitted to the people in the shape of constitutional amendments. They do away with a great deal of unnecessary intermediary process between the executive and legislative branches of the Government, and they send a simple proposition to the American people which they will readily comprehend.

I, Theodore Roosevelt, in order to properly govern the people who have called upon me to preside over their destinies, to establish justice, insure tranquillity, promote the general welfare and secure the blessings of liberty, do hereby recommend the following amendments to the Constitution, to the Congress of the United States:

ARTICLE 1. Executive power: Whereas it has been established by congressional precedent and judicial authority, that in the exercise of executive power I am limited by the specifications of the Constitution; and

Whereas this interpretation ignorantly acquiesced in for over 100 years does not at all accord with my views upon the subject, now I recommend the following amendment to the Constitution, to be voted upon by the people:

All executive power of every sort and description at any time exercised by anyone shall be vested in me, and any interference with or criticism of the exercise of any power that I may consider myself invested with shall be construed as treason and punishable as such.

ART. 2. Judicial power: Whereas the Courts of the United States and the Appellate Courts of the different States have at various times rendered decisions upon constitutional questions which have not at all met with my approval, and which are contrary to my policies as Executive of the United States, it is therefore herein provided that in order to remedy this defect, and to make these decisions conform to my own interpretation of the Constitution, that whenever any of the appellate courts of the States, or the Supreme Court of the United States, shall decide a constitutional question, an appeal or writ of error shall lie to me, and whatever interpretation I may place upon the constitution of any State or upon the Constitution of the United States, shall be final and no further appeal shall be allowed.

ART. 3. Dormant legislative powers: Whereas the Congress of the United States has failed to exercise from time to time a large number of Federal powers upon the ground that such powers are not delegated

in the Constitution; and whereas this is a mistaken interpretation of the Constitution and there ought to be some tribunal that can exercise these powers for the general welfare of the people, therefore I recommend to the Congress of the United States the following amendment: "All dormant Federal powers not exercised by the Congress of the United States shall vest in me. The following powers are herein specifically enumerated. I shall have the right to grant charters to corporations and supervise their transactions; to issue interstate marriage licenses and to grant limited and unlimited divorces and permits for individuals to transact business; to define the amount of property that any one person shall own and what amount of business he shall transact; to superintend all the domestic affairs of the Nation; to prescribe the amount and quality of food that they shall consume; and to establish rules for the increase of population, prescribing the number of children that each family must contain, and provide adequate penalties for failure to attain the proper limit.

ART. 4. All Executive powers of every sort, kind and description and wherever situate and being, whether active or dormant, not herein delegated to me by these amendments are reserved to me, and I shall have the right at any time to submit to myself for my rejection or approval such further amendments to the Constitution as I may deem proper, so that I may more effectually carry out the designs and purposes herein indicated, and so that I may at all times insure absolute peace and tranquillity among the people whom I have been called upon to govern.

You know what I believe, Mr. President? I believe that there are a large number of Mr. Roosevelt's followers in this country who would today favor vesting in him autocratic power. Our institutions underwent a radical change under his administration. He inaugurated a new era of constitutional thought. He announced over and over again, in defiance of the unbroken decisions of the courts, that under the general welfare clause of the Constitution Congress had the power to enact any legislation that tended to the general welfare of the Nation. He discoursed upon inherent rights, when the Supreme Court had by an irrevocable line of decisions anchored the proposition in our constitutional history that we are strictly and literally a government of delegated power. He trespassed upon the rights of the States, and in one public utterance after another perverted the Constitution so as to encroach upon their

functions and invade their jurisdiction. The only department that saved us from dictatorial government was the judicial power of the States and of the Nation. Now it is proposed to practically deprive them of their constitutional functions. As this seditious proposal flashed through the country it shocked and appalled its intelligence, but, Mr. President, it has attracted an attentive audience, because the ex-President has whole battalions of loyal disciples who follow his leadership with the same discipline that an army follows its commander.

I want to say this: I agree with him in a great many things that he advocates. I am for progression and not for reaction. I am for the rights of the people against the domination of their political masters. This has been my familiar theme during the whole of my public career. Today the people are in the field, and the day of the political manager is over and the hour of the patriot and the statesman has arrived. We can see with the naked eye that a great revolution is in progress, and that this is the age of political liberty and legislators; and Representatives and Senators are being warned that they are the servants and not the masters of the people. Down with the walls and back to the people, wherever it can be done without undermining the institutions of the Republic. It is because I am for these things with all sincerity that I have arisen to deprecate this unfortunate delusion that Mr. Roosevelt has brought to the front. It injures the cause of the people's rights.

Even now the students of our colleges and universities who are studying the science of government and the framework of our institutions are inquiring what does this inflammatory effusion portend. I received a communication today asking me to explain its scope and effect, and I answered that its only scope and effect was to distract and derange the mind of anyone who attempted to reconcile it with the cardinal principles of the Republic. I received another letter from a young man telling me

he was studying to get to the United States Senate and asking me which side I was on upon this question. I will receive a score of these inquiries within the next few days. What sort of a Senate will this be in the years to come, if the minds of the rising generation are to be bewildered by such incendiary utterances as this?

No progressive leader in this body that I know of has ever given expression to such views. The senior Senators from Wisconsin and Iowa, both of whom have been strongly indorsed for the Presidential nomination, have never raised such an issue. They are men of sincere purpose and of deep convictions, and they have never undertaken to sap and undermine the foundations upon which the Republic rests. I had hoped that outbreaks like this were over when Mr. Roosevelt abdicated his place a few years ago, and started upon his restful and harmless expedition to the jungles of Africa to slaughter animals that Providence had never created. I had hoped that he might remain there and not return and start these frenzied schemes again. Here he is, however, and he has come to stay. I do not know what we will do with our friend. Would it be possible, if he consents, to tender him to the new Republic of China, in the event of his defeat—and I am satisfied that, even if nominated, he will be easily defeated. I would almost be willing to make a new treaty for Chinese immigration if they would accept him in exchange. This would be a splendid opportunity for him to start a Chinese constitution framed upon the plan that he has outlined. Of course, we will miss him—there is no doubt about that—and the exhilarating commotion and excitement that he is constantly treating us to. The newspapers will miss him. He is the most valuable asset of American journalism that ever made his appearance in this land. I will miss him personally, because I like him and he has been a constant source of interest and amusement to me. I regard him as the most unique and picturesque character in all American history.

When he was President I was constantly beguiled and diverted by his political performances.

I never retired at night that I did not expect some political earthquake in the morning, and I never arose in the morning that I did not look for some volcanic eruption at night. I think he is a most captivating and charming person. He can talk to you by the hour upon subjects that he does not know anything about with the same ease and facility that he can discuss those to which he has devoted the closest study. This is a gift of Providence that none of his predecessors ever possessed. His dissertations upon the Constitution are a feast of reason and a flow of soul. The last conversation I had with him was in relation to the case of Colonel Stewart, whom he had charged with certain temperamental infirmities, and in whose behalf I had asked for a court of inquiry in the Senate. He informed me that, being Commander in Chief of the Army and Navy of the United States, he would not pay the slightest attention to any law that Congress passed, and that he had a perfect right, if he wanted to, to sentence Colonel Stewart to death; that he did not intend to do it, but that he had the constitutional right to do so.

Mr. President, this is exactly the line of thought that he has followed in his address before the Constitutional Convention of Ohio.

He is simply advocating martial law. The best definition of martial law is that it is no law at all. When people are ordered to assemble in their polling places to set aside the solemn judgments of the courts that involve the rights of property and the liberty of our citizens and to trample upon precedent and order and authority, then we have an era of martial law. No one supposes for a moment that Mr. Roosevelt could carry a revolutionary system of this sort into operation. That is not the point. The point is, that he would use every power at his command to strengthen the executive arm of the Government and

compel the Federal judiciary to fall in line with his policies. Whenever he is to make appointments to the Supreme Court and to the various Federal circuits, or is to select an Attorney General for his Cabinet, he will have a distinct understanding and ascertain definitely before the appointments are determined upon that his nominees are in accord with him upon constitutional construction and executive power. We know what he will do in the future from our experience in the past. He held his party in Congress under absolute vassalage and subjection, and he will revive his attempt to place the judiciary under his influence and control.

Make no mistake. I am not exaggerating the situation. He is perfectly sincere, and his motive is not a corrupt one. He will do this because he is possessed with a mad fancy that this is and ought to be, an Executive Government, that the powers of the Executive ought to override those of the legislative and judicial branches of the public service. And what he proposes is not by constitutional amendment, because he knows he can not procure it, but by all the patronage and all the power and all the resources that he can command, to practically force upon the country an interpretation of our organic law that will level its distinctions and mutilate and obliterate its checks and balances. He will then, in the pursuit of his own insatiable ambition, possess a degree of autocratic power that no President of these United States has ever attained or would have ever dared to exercise, except at the risk of impeachment.

Speaking for my country and not for my party, speaking for the autonomy and stability of our institutions, speaking for the Constitution in all of its parts, if we are to pass in again under his yoke, with his outstretched arm, hanging over the seat of justice, the refuge and bulwark of our institutions, ready to strike it down with a wanton attack upon its integrity, and if this attack is to succeed and the era of the common law is to be revived, when its judges were the abject serfs and

slaves of the Crown, then, in my judgment, it would have been better if the Constitution had never been framed and its authors had never attempted by an apportionment of constitutional functions almost perfect in their allotment, to construct an indissoluble Union of indestructible States.

SINKING OF THE STEAMSHIP TITANIC.

In an address delivered in the Senate May 28, 1912, Senator Rayner reviewed the findings of the select committee named by that body to investigate the most appalling marine disaster in all history, and urged sweeping amendments to the navigation laws.

I desire to ask the attention of the Senate to the subject matter indicated in my notice in reference to the disaster to the *Titanic*.

I shall not bring to your attention the harrowing details of this overwhelming calamity, but my purpose is to ascertain what lessons this disaster teaches us and what legislation, if possible, can be framed in order to avoid a recurrence.

Mr. President, we must change the admiralty and navigation laws of this country. They consist of an incongruous collection of antiquated statutes which should be repealed and re-enacted so as to meet the necessities of ocean intercourse of the present day. This is surely one lesson that has been taught us by this dreadful calamity. Without entering into minute details, I submit to the Senate the following suggestions for its consideration.

In the first place, let me say a word about the investigation by the Senate Committee. The committee of the Senate has no power beyond that which it has exercised. In conducting the investigation it acquired its jurisdiction under constitutional clause to regulate commerce. It is because Congress has jurisdiction to regulate commerce between the States and foreign

countries that the committee had the right to undertake this investigation. It would have had no right whatever to summon and examine witnesses unless it had jurisdiction over the subject matter, and the jurisdiction it has, is based upon the fact that by virtue of this examination it is able to recommend to the Senate, under this clause of the Constitution, such improvement in our laws as will enable us to avoid a recurrence of this accident. Therefore the Senate was perfectly right in appointing this committee. The committee, acting strictly within its jurisdiction and the decision of our courts under a case that I read to the Senate a few weeks ago, has done its full duty in the premises and has done it well, and the committee, and especially its able chairman, deserves not only the gratitude of the Senate, but the commendation of the country for the impartial performance of their delicate and arduous duties. If it had not been for the prompt action of the senior Senator from Michigan there would have been no investigation, and his analysis and conduct of the case, thorough in every respect, deserves the appreciation of the Senate and the approval of the people in the highest degree.

I come now to the second proposition. It seems to be universally conceded that this ship was not equipped with a sufficient number of lifeboats to provide for the safety of its passengers. There may have been a sufficient number in accordance with the rules of the British Board of Trade, but it is a conceded fact that the great loss of life occurred because there was an insufficient number to meet the necessities of the case and rescue the passengers and crew.

Third. The failure of foreign steamships to carry searchlights is utterly inexcusable, and if a proper searchlight had been upon this vessel, in my judgment, the accident could have been avoided.

Fourth. The failure to supply the proper officers with binoc-

ulars was unquestionably an act of negligence, especially, as I gather from the testimony, that a demand had been made by the proper officers for them, and the demand had been refused.

Fifth. There was not the proper attention paid to the wireless messages that the ship received. This appears to me to have been an inexcusable act of negligence.

Sixth. The speed of the vessel was not lowered, as it should have been, when notice was received that she was in a dangerous zone. My own judgment, therefore, is that there was negligence in this case, and that the disaster was attributable to the want of due care upon the part of the company and of those in charge of the ship. The proper tribunals will determine upon this question, unaffected by any conclusion that we may arrive at in the premises.

I have said that the navigation and admiralty laws of the United States ought to be changed. Now, in what respects ought the proper amendments be made?

First. We can not change the criminal features so far as crimes and criminal negligence occur upon a foreign ship on the high seas. Prosecution for criminal negligence in the *Titanic* disaster can only be brought in the British courts, as a British ship upon the high seas is British territory. This is an unbending rule, and, as announced by the Federal courts, is stated as follows:

The general rule is that such courts have no jurisdiction of the offense, even when committed upon the high seas, except when committed on board of a ship or vessel of the United States, unless it appears that the vessel was sailing under no national flag.

The only exception to the rule is where death occurs in one of our States as the direct result of injuries or exposure resulting from criminal negligence of some one on the ship. Such a prosecution, as has been decided by the Supreme Court

of Massachusetts, might be sustainable upon the theory that the crime was committed where it took effect.

Second. There ought to be a remedial statute providing that a civil action for personal damages against the owners of the ship could be brought in either the Federal or State courts, and the limited liability statutes of the United States should be repealed.

Third. There ought to be a statute providing that surviving relatives, under Lord Campbell's Act, can bring suit either in the State or Federal Courts, and the limited liability statutes should be repealed so as not to apply to a case of this sort.

Fourth. There ought to be a statute providing for a sufficient number of lifeboats and for the adequate equipment of ships with wireless telegraph. There is no doubt about our right to pass such a statute, even as to foreign ships, because we have full authority to say that foreign ships shall not enter or leave our ports unless they are properly supplied in this particular, and even our statutes now are supposed to furnish that remedy.

Fifth. The doctrine of "Knowledge or privity of the owner" should be swept from the statute book, and it should not be necessary in order to hold the owners to a full responsibility, to prove that the negligence occurred with the privity or knowledge of the owners. There is no reason why owners of ships should not be responsible for the negligence of the crew in the same way that railroad corporations are held responsible for the negligence of their employees. The whole subject is largely in our hands. We should without delay pass a system of laws that, in my judgment, would be sufficient to avoid a repetition of this heart-rending disaster. For a full discussion of the law as it now stands, I refer the Senate to the following cases: *Schoonmaker v. Gilmore* (102 U. S., 118); *Rich-*

ardson *v.* Harmon (222 U. S. 96); the case of *La Bourgogne* (210 U. S. 97); and *Commonwealth v. MacLoon* (101 Mass., 1).

And the cases I have already referred to in Thirteenth Wallace and One hundred and ninth and One hundred and thirteenth United States.

Now, just let me explain to Senators how the law stands. I think I can do it in a few moments.

At present you cannot recover in the Federal courts for the death of a passenger. There is no recovery at all by the surviving family or the surviving relatives in the Federal courts for the death of a passenger. In these accidents the British law provides, under Lord Campbell's Act, that recovery can be had; and in the case that I have cited, in Two hundred and tenth United States, the Supreme Court held that it would administer the French law; that the law which governs a casualty of that sort is the law of the country to which the ship belongs, and, therefore, France having a law providing for recovery in case of death, the Supreme Court, in the case I have quoted, the *La Bourgogne* case, held that the Supreme Court of the United States would administer the French law in the Federal tribunal. This ought to be changed, and we ought to be able to administer American law in American tribunals, and not have to resort to the law of the country that owns the ship upon which the accident takes place.

Now, in the second place, I want to say that you can not recover at all, if the owner of the ship surrenders the ship and surrenders the freight. We have an old statute here that is a re-enactment of an English statute, passed 175 years ago, and we have never changed it. It was passed during the reign of George II, in 1734. It was improved upon in the reign of George III, in 1786, and again in 1813. That is the limited-liability statute. Look at it for a moment. The owners of

the *Titanic* can come into court and surrender their freight money, the pending freight, and there is no recovery against them in any State or Federal court. No matter how many suits are brought in the State courts, no matter how many suits may be brought in the Federal courts, the owners of that ship, no matter how able they may be financially to answer in damages, can go into Federal courts, sue out an injunction, have a trustee appointed, bring the ship, if it exists—of course in this case the ship is gone—bring pending freight into court, and escape all liability whatever for injury to passengers, for injury to goods, or for any cause.

That is the statute that is now upon the statute books of the United States. It ought to be repealed or modified. There is no reason on earth why it should continue. When it was passed it was thought to afford an invitation to shipowners to take to the sea and risk the hazardous character of adventure, but I apprehend there is no more danger on the sea now than there is on land; and if these statutes are not repealed, there certainly ought to be some modification of them. Now, if you can prove the privity of the owner, you can recover, and the only question of privity which arises in the *Titanic* case is whether the presence of Mr. Ismay on board this vessel carries with it the privity and knowledge of the owner. You can recover full damages if you can prove privity and knowledge of the owner, but if you can not prove the privity and knowledge of the owner, then the company is not responsible for the negligence of its crew, and all that can be recovered is the ship, if it exists, and the freight money, if it is brought into court.

The only open question in this case is whether or not the presence of Ismay on the ship makes the owners responsible. I am inclined to think his presence on the ship would not have this effect. He was one of the trustees of the line. He was one of the directors of the line. He was upon the executive committee of the line. He was chairman of the finance com-

mittee or upon the finance committee, and he was president of the line. In fact, he was almost the line itself. But, nevertheless, I doubt very much whether as a proposition of law his mere presence on the ship itself, admitting that he was not present as a passenger, would come within the Federal statute, which holds that damages can only be recovered where there is a privity or knowledge of the owner. Thus stands the law, and the law ought to be changed.

In Great Britain, I believe, the law provides that the freight money shall be equal to £15 to the registered ton; and in the loss of the *Titanic* that would amount to a great deal; but we have not any such statute, and there is no recovery here at all. There is no recovery for death, because it does not come within the admiralty laws, and there is no recovery for damages against the company unless you can prove the privity and the knowledge of the owner. The last case on the subject is the case in Two hundred and tenth United States Reports, which is one of the best opinions, in my judgment, that was ever delivered in the Supreme Court of the United States. Chief Justice White goes into an elaborate and exhaustive discussion of all the questions that are involved in that disaster in case of a collision, and he administered the Code of Napoleon in the Supreme Court of the United States, where it required a very thorough investigation to discover what the French body upon this ruling was. The Supreme Court came to the conclusion that under the French code you could recover for death; but they came to the further conclusion that there was no privity or knowledge of the owners, and that, therefore, they had a right in the *Bourgogne* case, in the case of the collision of a French with a British ship, to go into the French courts, surrender freight money, and escape all liability. These provisions have been on the statute books from time immemorial. We have a bill now in the Judiciary Committee attempting to remedy these obsolete provisions of our naviga-

tion laws, and they ought to be remedied, because nearly every other civilized government has adopted statutes in reference to them.

There is another lesson that this disaster teaches us, and which ought to be one of general application, and that is the lesson of corporate responsibility. We must enact legislation that will make the controlling and superior officers of corporations within our own jurisdiction, criminally responsible for the careless and negligent management of the public-service corporations which they control. I have made this suggestion over and over again, and I repeat it now in the most emphatic way that I can, that it is a shame and an outrage that the criminal statutes of this land permit the men who are really responsible absolutely to escape from the penalties of the law, and inflict penalties and punishments upon those who are simply acting under their superior orders. We know how a large number of these corporations are organized, and what I have reference to now are American corporations, because in Great Britain corporations are controlled by laws that are more efficient and severe than ours. Let us look at the scheme a minute.

A number of individuals organized a trust. We call these companies trusts for want of a better name. The promoters absorb and consolidate a number of competing companies, and then, in order to promote the scheme, a bonded indebtedness is created. The promoters in almost every instance get the bonds and the public gets the stock. Then the consolidated company goes into operation and, as a rule, the bondholders, who consist of the individuals who practically own the constituent companies, have very little, if any, interest in the active management of the concern. The president and managing officers—I will not say in all cases, but in a great many instances of the administration of public-service corporations—perform simply perfunctory duties, their position being largely a sine cure, and the management being left to other

hands. I know of one railroad accident after another, and one steamship accident after another, that is entirely due to the negligence of the directorate of the respective companies. Did we ever hear of a director or a president of any public-service corporation being indicted for manslaughter in an American court in any case whatever where the accident was directly attributable to the oversight, neglect or carelessness of the company's management? American corporations in a number of instances are running loose and wild, without curb and without reins.

Take the street railroads of Washington. I have never in any city in the Union seen such an utter disregard of the people's rights. I have time and time again intended to offer some measure here to bring them to bay and call them to terms, and I expect to follow up this purpose. They are violating their charters and they are not giving the people proper accommodations and facilities. I have been in these cars hundreds of times, when afflicted and helpless people have been made to stand from almost terminus to terminus, simply because the management of these railroads will not run a sufficient number of cars, and will not give to the people of this District the rights that they are entitled to. They forget that they are the trustees of the public as well as the trustees of their stockholders.

It is a delusion that these gentlemen are laboring under that they represent private stockholders alone, and that their duty ceases when they pay their own salaries and interest upon their bonds, and a dividend upon their stock. They owe just as great a duty to the public as they do to the private interests that they represent, and I think the time has come when we must lock hands in this Congress of the United States and demand of these public-service corporations, interstate and in the District of Columbia, that under the heaviest penalties they must properly administer their charter obligations and that the public

will no longer stand by and permit the gross violation of their public duty to take place from day to day as it is now doing in this District and elsewhere. What occurs here, occurs all around us, and I call upon Congress, taught the lesson as it is by this terrible disaster, to fix the standard and the measure of responsibility, not against sailors and captains and conductors and brakemen and motormen, unless where they are personally negligent, but upon the heads of these corporations, where the responsibility attaches to them for the proper direction and management of the interests that they represent.

There is another lesson, however, Mr. President, that this disaster has taught us, of more importance than a change in our admiralty and navigation laws, and of far greater and more overwhelming significance than the lesson of corporate responsibility. That is the lesson of religious faith. Disasters like this, instead of weakening, should strengthen the faith of the Nation. There is no use of appealing to reason or to the philosophy in a case of this sort. The mind stands aghast and appalled as these calamities come thick and fast. We forget in our moments of sorrow that it never was intended that the intellect of man should reason out such a problem. Suffering and affliction, as they come to the pure and the innocent in a hundred forms, are inexplicable.

The convulsions of nature alone that have swept myriads of human beings to an untimely death can not be reconciled by any process of human reasoning. When reason halts, the Creator has implanted in the soul another faculty, however, that gives us light in the hours of tribulations. It is the light of faith, a pillar of fire in the night of our darkness and despair. Throughout my life I have spent many hours of the day, and many silent and sleepless hours of the night, in the struggle for the light of reason, but in my advancing years the light that gives me fortitude and courage is the sublime light of faith, that never dims nor wanes, and at the supreme moment,

when reason vanishes, breaks in upon us with all the radiance of the morning sun.

We can reason out the negligence of man, but we can not reason out why, in the course of nature, an iceberg from the Arctic Zone should just at this very moment have taken its course upon the path of desolation and of death. Upon all this and kindred subjects the most profound intellect of the greatest philosophers who ever lived have illumined the world just about as much as the credulity of the earliest races, who attributed every phenomenon of nature to the interposition of Divine Providence. What this Nation needs are some severe lessons that will strengthen the pillars and the altars of its faith. We are to a large extent today, defying the ordinances of God, and the sooner we awaken to a realizing sense of our responsibility the better it will be for the spiritual elevation of the country. We are running mad with the lust of wealth, and of power, and of ambition. We are separating society into casts, with fabulous fortunes upon the one side and destitution and poverty on the other. It takes a terrible warning to bring us back to our moorings and our senses. We are abandoning the devout and simple lives of our ancestors, and the fabric of our firesides is weakening at the foundation. If this disaster teaches no lesson or points no moral, then let us pass it by with stoical indifference, until the next disaster comes, and in the meantime let the carnival go on. May the heart-rending scenes upon this night of anguish and of woe give us faith and lead us back to the altars of our fathers. I will not rehearse the agonies of this midnight sacrifice. I can not afford to dwell upon them or listen to the details that almost distract the mind and break the heart. It is the lesson and the moral that I am searching for.

I will say this, however, in closing: The agonies of separation at this scene, that palsy the tongue when it attempts to describe them, were worse than the agonies of death. I knew

well one of the courageous passengers who, with his wife, yielded up their lives on this occasion. The man was a splendid type of American citizenship. I served with him in the House of Representatives, and he was esteemed and beloved by all who knew him. In private life he was a benefactor of the human race. In public life he was an unpurchasable tribune of the people. His heroic wife had the blood of martyrs in her veins, and from the most authentic account that I can obtain, the account of a witness who was not examined by the committee, because her testimony was not necessary for the purposes of the investigation, she went to her death with the same spirit of heroic fortitude with which her ancestors went to the fagot and the flame.

A harrowing thought flashes across my mind, and that is, it might possibly have been unnecessary to have presented to this devoted man and woman the terrible alternative that confronted them, and it might have been possible that both of them could have been rescued. I shall dwell upon this incident no longer.

I shall close my brief remarks with this remembrance. As the ship was sinking the strains of music were wafted over the deck. It was not the note of any martial anthem that had, in days gone by, led embattled legions on to victory. It was a more inspiring stanza than this. It was a loftier and holier melody amid the anguish and the sublime pathos of that awful hour that swept through the compartments of the sinking ship. It was a rallying cry for the living and the dying—to rally them not for life, but to rally them for their awaiting death. Almost face to face with their Creator, amid the chaos of this supreme and solemn moment, in inspiring notes, the unison resounded through the ship. It told the victims of the wreck that there was another world beyond the seas, free from the agony of pain, and, though with sombre tones, it cheered them on to their untimely fate. As the sea

closed upon the heroic dead, let us feel that the heavens opened to the lives that were prepared to enter.

Father of the Universe, what an admonition to the Nation! The sounds of that awe-inspiring requiem that vibrated o'er the ocean have been drowned in the waters of the deep. The instruments that gave them birth are silenced as the harps were silenced on the willow tree. But if the melody that was rehearsed could only reverberate through this land, "Nearer, My God, to Thee," and its echoes could be heard in these halls of legislation, and at every place where our rulers and representatives pass judgment and enact and administer laws, and at every home and fireside, from the mansions of the rich to the huts and hovels of the poor, and if we could be made to feel that there is a divine law of obedience and of adjustment, and of compensation that should command our allegiance, far above the laws that we formulate in this presence; then, from the gloom of these fearful hours we shall pass into the dawn of a higher service and of a better day, and then, Mr. President, the lives that went down on this fated night did not go down in vain.

INCREASING THE PENSION OF MRS. SCHLEY.

Senator Rayner's last effort on the floor of the Senate was an address to that body on June 3, 1912, demanding that justice be done the widow of the gallant officer to whom his government, a decade before, had denied justice.

Mr. President, my bill is entitled "A bill granting an increase of pension to Annie R. Schley," and it provides:

That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll, subject to the provisions and limitations of the pension laws, the name of Annie R. Schley, widow of Winfield S. Schley, late rear admiral, United States Navy, and pay her a pension at the rate of \$150 per month in lieu of that she is now receiving.

The committee reported \$50 a month, and my motion to amend will be to increase the pension to \$150 a month, as in the bill I originally introduced.

Mr. President, in offering this amendment to the bill of the Pension Committee, asking \$150 a month for the widow of Admiral Schley instead of \$50 a month as allowed by the committee, I desire to say that I have no comment whatever to make upon the action of the committee. With the committee it is a matter largely of precedent and of rules and regulations. With us in the Senate I apprehend it will be a matter of patriotism and impartial justice. It is really a pittance that I am asking for the widow of Admiral Schley in her comfortless and declining years. I do not regard it exactly in the light of a pension, because it is beyond that, a recognition of the memorable services that this gallant officer performed for his country at so many stations and places that it would be almost impossible to enumerate them in the brief presentation that I am making to the Senate. One thing is sure, and that is that if this amendment is adopted it will meet from one end of the Union to the other with the commendation of our countrymen.

Admiral Schley was esteemed during his life by all who knew him personally, and admired by hundreds of thousands who did not know him personally, and now, in death, there is not even in bated breath a whisper of enmity upon the part of those who were hostile to him during his life.

Mr. President, we pay nearly \$200,000,000 a year in pensions. Is there a patriot in the land, or in any section of it, who will criticise an allotment to his surviving widow of \$150 a month? As the report shows, she is in dire need of it, and if she did not need it, I would not be here asking for it on her behalf at the hands of an American Congress. She is without the means to erect a suitable memorial upon his grave. Just think of it. Would any other country on this earth deny

her at least this tribute to his memory? He deserves more than a shaft of marble and an epitaph to commemorate him. He deserves in this Capital of the Nation a testimonial that shall speak to all the ages of his illustrious deeds. And even such a memorial will perish and decay before his memory shall depart from the thoughts and remembrance of posterity.

I do not intend to exaggerate the achievements of his career. He was criticised when he was alive, but of all the heartless vocations in the world that of the critic is the most unenviable. A critic is generally a person who has no reputation of his own, but who expects to rise in public estimation upon the ruins of those whom he attempts to detract and humiliate. As a rule, contemporary historians are not fair judges of the events that are transpiring around them. History has hardly ever been correctly written by any man who was the living witness of its events, because, generally, political prejudice and personal enmities enter into the narrative and the recital. The career of Admiral Schley seems to be an exception to this rule, because never in my life have I known a man so universally idolized by the Nation whom he served. He had but one idea in his mind, and every other plan and purpose of his life seemed to be subordinate to that, and that idea was his country. When he entered its service he took a vow upon its altars that he would devote and dedicate his life to its cause, and I challenge the bitterest enemy that he ever had to point to a single and isolated instance where he ever wavered or faltered when duty summoned him to the front. He never possessed the element of fear, he never knew what fear was, and I am satisfied that in his own mind the greatest ambition that he could have achieved would have been at any moment to have given up his life in defense of the Union that he helped to cement, and whose colors he proudly carried in every clime, from the Arctic to the Torrid Zone.

Is the widow of such a hero to pass her years in desolation

and in sorrow without the ordinary necessities of life? If so, then the history of civilization presents no parallel to a case like this, and the heart of the Nation would no longer thrill with the patriotic recognition of patriotic deeds.

I will not refer to history in support of the assertion that in the earliest days even heathen nations accorded to their heroes, and to their surviving families, the recognition to which they were entitled. I will take a modern instance in referring to the fact that when in the war Great Britain waged in Africa, Khartum was captured by a British general, the same year in which Schley destroyed the Spanish fleet at Santiago, all the honors were heaped upon her commander that a government could bestow. There was conferred upon him a great title at the hands of the Crown; he was voted the gratitude of both houses of Parliament; an enormous fund was subscribed to found a university in the capital that he captured; he was made governor general of the territory in which his services were rendered, and was granted a pension equal to \$150,000 in American money.

This Republic, I know, will not be ungrateful. I will not rehearse at this moment a detailed description of Admiral Schley's achievements in almost every quarter of the globe to which he had been sent. He has written his own biography in modest and accurate terms, and his biography has been written by others, and these will be read in the years to come by the rising generation, and will furnish an incentive to them to follow his deeds and emulate his example.

At Santiago he was surrounded by a band of heroic captains whose names will illustrate the annals of American history. Some are living, some are dead. Wainwright is living, this valorous and intrepid man who performed a feat upon that day unsurpassed for daring and skill by any that John Paul Jones ever performed upon the waters of the deep. Clark is living,

who ran his ship, as if upon the wings of lightning, from sea to sea, just in time that his soul could breathe the fire of battle amid the carnage of that day. Evans is gone. All honor to his imperishable name. He was separated from Schley in life; they are united in death. Chadwick, the commander of Sampson's ship, is living, and has attested in the strongest way to the efficient maneuver that Cook, the great commander of the *Brooklyn*, ordered at a critical moment of the conflict. Sampson is dead, and I would have been here this day asking for a pension on behalf of his widow if she had not acquainted me with the fact that her situation was such that she did not need the aid of Congress.

All honor to the living and to the dead, and shame to the carping censors who would intrude themselves upon this scene of reunited glory.

I do not intend to enter upon a description of the conduct of Schley at Santiago, but it seems to me that this is the proper occasion, and I propose to avail myself of it, to show that the famous order for what is known as the "loop" of the *Brooklyn*, that Schley gave upon the spur of the moment and in the heat of battle, decided the conflict and saved the day for the American arms. After years of silence upon the subject by all who witnessed the event, Admiral Chadwick, the captain of Admiral Sampson's flagship, has proclaimed this fact to the world, but in deference to the memory of Schley, I desire it once and forever to go down in unambiguous terms and indelible letters upon the records of an American Congress. We demonstrated it at the trial, and now comes the sustaining approval of Chadwick, which places it beyond the realm of doubt and uncertainty. I say that Schley gave the order. This is not entirely accurate. Cook, the captain of Schley's flagship, gave it, but Schley approved it, and with the generous heart that he had, he was willing to assume all responsibility, even if it had been a mistake or an error. It was neither. It was a triumph

of naval and nautical skill that was never understood by portfolio chiefs. Its scope was entirely grasped by Admiral Dewey when he declined to concur in the opinion of the remaining admirals who sat with him upon the tribunal that decided the case. I have not one word of comment to make upon their action, but, Senators, listen to the narrative for a moment. I would like anyone who ever takes the trouble to read a word of anything that I have ever said upon this floor to reflect upon the statement that I now make, and to which I challenge contradiction.

Admiral Sampson before he left for Siboney gave the order to his fleet to close in upon the Spanish ships in the event that they made an effort to come out of the harbor of Santiago. Sampson, with all his great skill and experience as a naval commander, could not possibly have foreseen what the Spanish plan of battle would be. The *Brooklyn*, Schley's flagship, was steering a course diametrically opposite to that steered by the Spanish fleet, and in their attempt to escape, the Spanish squadron had practically broken through and passed the battle-ship line, creating an emergency that no one could have foreseen, and which had to be met immediately. The commander of the *Maria Teresa*, the leading ship of the Spanish fleet, intended to ram the *Brooklyn*, in accordance with the Spanish plan of battle. Not only this, but, owing to this new situation, there was danger of a collision among the American ships, and Cook immediately sent word to Schley that "We will soon be in the cross fire of our own fleet." It was then that Cook gave the order "hard aport," and the *Brooklyn* swung rapidly around to the west a little more than half her tactical diameter, and Sears, the flag lieutenant of the *Brooklyn*, was ordered by Admiral Schley to hoist the signal, "Follow the flag." Then, with Clark of the *Oregon* upon the *Brooklyn's* quarter, the most terrific fighting of the day began. In a short time smoke was seen issuing from the ports and hatches of the *Maria*

Teresa, the leading Spanish ship. The smoke upon the *Brooklyn* had blinded the crew so that they could not see what was going on. "Keep the boys informed," said Schley to Cook, and every few minutes of the action, word was sent by Cook to cheer them on, and the ringing cheers came back until the *Maria Teresa*, leaping from fire into flame, burning from fore to aft, turned into the beach six miles west of Santiago Harbor. Then the *Brooklyn*, receiving more shells than and inflicting as much injury as the whole of the American fleet combined, went westward on her course in pursuit of the remaining Spanish ships, until fire was seen issuing from the *Oquendo*, the second vessel of the Spanish fleet, and with the *Oregon* and *Brooklyn* in pursuit, she was beached within a half mile of where the *Maria Teresa* gave up the fight.

Then came the *Viscaya*, and in her flight and in her despair, she made a desperate turn towards the *Brooklyn* and the *Oregon*, that were pursuing her, but as she did this she was struck by a shell from one of the vessels and, hauling her colors down, she was beached at Acerraderos, sixteen miles distant from where the battle began. Then it was that Ellis, struck by a shell, fell upon the *Brooklyn* at the side of Schley, and then it was that as his headless body was about to be cast overboard, Schley gave the order: "Bring the body back and we will give it Christian burial." The *Colon*, the last of the ships, was then making towards the Torquino River. Schley signaled the *Oregon*, under the command of Clark, to try his 13-inch guns upon her, and with the combined fire of the *Brooklyn* and the *Oregon* upon the ship, and with no possible chance of escape, and with her human cargo doomed to certain death if the fighting continued, her commander ran his ship ashore at the mouth of the Torquino River, fired his leeward gun, lowered his flag, and the colors of Spain went down before the colors of the Union upon the Western Continent.

"This entire plan of battle was all a mistake," said Schley's enemies, "and he ought to have conducted a different line of battle." Now, let me read you Dewey's verdict. These are his words:

Commodore Schley was the senior officer of the squadron off Santiago when the Spanish squadron attempted to escape on the morning of July 3, 1898. He was in absolute command, and is entitled to the credit due to such commanding officer for the glorious victory which resulted in the total destruction of the Spanish ships.

I will venture the prediction that you could go today to any section or quarter of this Union, from its eastern to its western coast, and assemble promiscuously any convention of patriots that you could collect, and this verdict of Admiral Dewey's would be affirmed and ratified and applauded by the re-echoing acclamation of his countrymen.

There is another charge that Schley had to meet that I desire briefly to refer to, and that was that in the conduct of the fleet along the Cuban coast he had disobeyed orders of the Navy Department. This was not the first time that Schley in his military career had found it necessary to disobey the orders of his superior officers. During the Civil War, at the siege of Port Hudson, when he was in charge of the *Monongahela*, the signal was raised upon Farragut's vessel to retreat. The quartermaster reported to Schley that it was impossible for him to see the signals. The order had been previously given to storm the battery. This was the signal that Schley saw, and instead of retreating he leveled his guns against the fortifications. He was reprimanded by Farragut, but afterwards the Admiral called him into his private cabin and said to him: "I have reprimanded you in the presence of the crew because you did not follow the signal to retreat, but I now congratulate you upon the work that you have done. May you repeat this accomplishment in after years." It will be recalled as an historic incident that years before, Horatio Nelson, at Trafalgar,

raised his signal "England expects every man to do his duty," and fell mortally wounded upon his flagship. At the battle of the Baltic, he placed his glass to his blind eye and reported to his commander, Sir Hyde Parker, that it was impossible for him to see the signal to retreat, which was accurately true, and, instead of retreating, he made his famous charge upon the Danish line.

The time has passed when Secretaries of War or Secretaries of the Navy, who have never, perhaps, observed any military tactics, except in dress parade, and who could hardly tell the difference between a revenue cutter and a battleship, can fight battles with lead pencils and rulers and india rubber, thousands of miles away from home. You tell a naval commander, for instance, that he must coal at sea, when, owing to the condition of the tide and winds, coaling from a collier is absolutely impossible, he is bound to disobey orders or go to the bottom of the deep; you order an admiral to sail eastward on the southern coast of Cuba when he is encountering the Gulf Stream, and to make as good time as a vessel on the northern waters, where there are no impediments to encounter, and you are bound to have an unexecuted order. You instruct him to watch for signals on the Cuban coast, and then you instruct another officer to meet him who knew the significance of the signals, but who failed to impart their meaning to him, so that he could not tell whether the signal lights were made by the Spanish forces or by the Cuban insurgents, and then you authorize a distinguished metaphysician and psychologist who was presiding over the Navy Department to court-martial him for not obeying orders. I ask what sort of discipline and justice and intelligence you can expect in the service of your country? I make the assertion that Schley never disobeyed a single order in all his military service, except when it was absolutely necessary or utterly unintelligent, incomprehensible, and impossible of execution.

And now, Mr. President, all of these transactions have closed and Schley is gone. He has fought his last battle, he has raised his last signal, and his guns have roared their last farewell. He is now upon the beach where the tide no longer ebbs and flows. He has crossed the bridge that spans this life to the eternal shores, and his ship has passed the horizon and is anchored in the harbor from which no voyager ever returns. I always felt that he never recovered from the blow his country dealt him. He delivered her as great a victory as she ever gained upon the sea, and she accepted it with ingratitude and with ungracious hands. The greatest struggle he ever passed through was not amid the shot and shell at Santiago; it was when the shafts of malice and hatred were leveled at his breast; but he stood with head erect just as his boatswain described him standing on the *Brooklyn's* bridge with head erect, when every other head was bowed but his. During all these trials his devoted wife stood by his side with all the fervor of her girlhood days, and in the hours of gloom and anxiety with heroic fortitude she cheered him on with all the consecration that only a woman can bestow, and with all the sacred, self-sacrificing love that only a woman can feel. During one of the sleepless hours of the night, as the trial was proceeding, when he realized that all the mighty resources and influence of those in authority were arrayed against him, he said to me:

I have battled with the elements in the Arctic Zone, I have battled with the foe in the service of my country, but this is the severest ordeal through which I have ever passed. I wish I had died at Santiago. I am weary; I am weary.

Yes, Mr. President, he was weary; but the weary sun hath made a golden set, and by the bright track of its fiery car it gives token of a goodly day tomorrow.

Mr. President, I move that the amount named in the original bill—\$150 a month—be substituted for the amount—\$50 a month—named in the bill reported by the committee, and on that motion I ask for the yeas and nays.

